Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREAT LAKES DREDGE & DOCK COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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111 pp

QUESTIONS PRESENTED

I. Whether a nonsettling defendant found liable under the National Marine Sanctuaries Act, 16 U.S.C. §1431 *et seq.*, is entitled to credit for plaintiff's settlement with a joint tortfeasor based on the "proportionate share" approach set forth in *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994).

II. Whether the United States has a right to recover damages under 16 U.S.C. §1443 of the National Marine Sanctuaries Act where the lands and injured natural resources at issue are owned by and under the jurisdiction of a sovereign State, and the United States has no proprietary interest therein as required for the recovery of damages under *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).

III. Whether the "superseding cause" defense set forth in *Exxon Company, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996) and admiralty law's longstanding "assist tug" defense are available in an action under 16 U.S.C. §1443 of the National Marine Sanctuaries Act.

LIST OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all interested parties including parties to the proceedings below:

1. Honorable R. Lanier Anderson III, U.S. Circuit Chief Judge, Eleventh Circuit.

2. Honorable Ted E. Bandstra, U.S. Magistrate Judge, Southern District of Florida.

3. The Board of Trustees of the Internal Improvement Trust Fund for the State of Florida, Plaintiff.

4. Honorable Stephen P. Brown, U.S. Magistrate Judge, Southern District of Florida.

5. Coastal Marine Towing, Defendant.

6. Honorable Edward B. Davis, U.S. District Judge, Southern District of Florida.

7. Honorable Peter T. Fay, U.S. Circuit Judge, Eleventh Circuit.

8. Florida Department of Environmental Protection, Plaintiff.

9. State of Florida, Department of Environmental Protection, Attorneys for Plaintiff, State of Florida.

10. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Attorneys for Defendant, Coastal Marine Towing.

11. Great Lakes Dredge & Dock Company, Defendant/ Petitioner.

12. Mark Hicks, Esq., Appellate Counsel for Defendant/ Petitioner Great Lakes.

LIST OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

13. John W. Keller, III, Esq., Attorney for Defendant/ Petitioner Great Lakes.

14. John Keller & Associates, P.A., Attorneys for Defendant/Petitioner Great Lakes.

15. Alan R. Kelley, Esq., Attorney for Defendant, Coastal Marine Towing.

16. Honorable Joan A. Lenard, U.S. Judge, Southern District of Florida.

17. Sylvia F. Liu, Esq., Environment and Natural Resources Division, U.S. Department of Justice, Attorney for Plaintiff/Respondent, United States of America.

18. Maureen M. Malvern, Esq., Attorney for Plaintiff, State of Florida.

19. John A. Mueller, Esq., Environment and Natural Resources Division, U.S. Department of Justice, Attorney for Plaintiff/Respondent, United States of America.

20. Robert A. Oakley, Esq., Environment and Natural Resources Division, U.S. Department of Justice, Attorney for Plaintiff/Respondent, United States of America.

21. Honorable Paul H. Roney, U.S. Circuit Judge, Eleventh Circuit.

22. Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Attorney for Plaintiff/Respondent, United States of America.

LIST OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

23. Sharon Shulter, Esq., Attorney, U.S. Department of Commerce, National Oceanic and Atmospheric Administration.

24. Honorable William C. Turnoff, U.S. Magistrate Judge, Southern District of Florida.

25. United States of America, Plaintiff/Respondent.

26. United States Department of Commerce, National Oceanic and Atmospheric Administration.

27. United States Department of Justice, Environment & Natural Resource Division, Attorneys for Plaintiff/ Respondent, United States of America.

Pursuant to Supreme Court Rule 29.6, Petitioner informs that Great Lakes' parent corporation is Vectura Holding Company, L.L.C.

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The opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case is cited as follows: *United States v. Great Lakes Dredge & Dock Company*, 259 F.3d 1300 (11th Cir. 2001). The lower district court's order of September 27, 1999 setting forth its findings of fact and conclusions of law is unpublished. Both decisions are reproduced in the Appendix ("App."). (App.1-43).

JURISDICTION

The Eleventh Circuit's decision was entered on July 30, 2001. (App.1). Great Lakes' petitions for rehearing and rehearing en banc were denied by the Eleventh Circuit on November 5, 2001. (App.44-45). This petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

This case involves the National Marine Sanctuaries Act ["NMSA"], 16 U.S.C. §§1431-1445 (a subcomponent of the Marine Protection Research and Sanctuaries Act ["MPRSA"]), and the Florida Keys National Marine Sanctuary and Protection Act ["FKNMSPA"], Pub.L. No. 101-605, 104 Stat. 3089 (1990). The text of the FKNMSPA and the most pertinent sections of the NMSA

(§§1432, 1433 & 1443) are reproduced in the Appendix. (App.46-71).

STATEMENT OF THE CASE AND FACTS

The facts which are material to consideration of the questions presented are set forth in the Eleventh Circuit's opinion and the district court's findings of fact and conclusions of law.[1] The following is an overview of those facts.

In May 1993, Petitioner Great Lakes Dredge & Dock Company ("Great Lakes") hired Coastal Marine Towing ("Coastal") to tow 500-foot lengths of dredge pipe and other equipment from Boca Grande on the west coast of Florida to Green Cove on the east coast of Florida. Coastal supplied two tugs, the Miss Necie and the Captain Joe and their crews. Great Lakes supplied two assist tugs, the Volunteer State and the Cavalier State. (App.2,21).

At all times during the trip, the Volunteer State was to assist and receive its instructions from the Miss Necie and the Cavalier State was to assist and receive its instructions from the Captain Joe. (App.21).

While proceeding through the Florida Keys National Marine Sanctuary, one of the pipes in a raft towed by the

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[1] Additional facts set forth in the record in the consolidated action below will be designated as "R.Doc.___," referring to the docket in Case #97-CV-2510, and "R.2Doc.___," referring to the docket in Case #97-CV-10075. Trial testimony will be cited as "TT" followed by the date and page number.

Miss Necie dragged the sea bottom creating a pipe scar approximately 13 miles long. (App.2,23).[2]

Due to a navigational error by the Miss Necie, which was being followed by the Captain Joe, the flotillas got off course. The Captain Joe momentarily ran aground while trying to pass the Miss Necie. (App.2,24).[3] The Captain Joe then attempted to pass the Miss Necie again and ran hard aground in seven feet of water. Great Lakes' assist tug, the Cavalier State, was tied to the Captain Joe. Thereafter, the Captain Joe unsuccessfully tried to get off the bank. (App.2,24-25).[4]

The following day, sanctuary and state officials helped devise a plan to extricate the Captain Joe. At high tide, the Captain Joe was powered off the bank by a combination of its own motor and the Cavalier State. The grounding of the Captain Joe left behind a channel 120 meters long, eight to ten meters wide and two meters deep. The grounding destroyed 7,495 square meters of sea bottom, consisting of turtle grass, manatee grass and

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[2] Both the United States and Great Lakes agreed that the pipe scar recovered on its own within three years and this figure was used to quantify damages in the Habitat Equivalency Analysis. (App.4,24).

[3] Had the Captain Joe stopped immediately upon touching bottom, and reported the incident to the authorities as required by 46 C.F.R. §§4.05-1, 4.03-1(b), no further damage would have occurred.

[4] The captains of neither the Captain Joe nor the Miss Necie saw fit to wait until daylight or seek other assistance in order to ascertain the best way off the grounding. Had either done this, or complied with the law by reporting the matter to the authorities, the blowhole damage would have never occurred.

finger coral. The extrication of the Captain Joe also created a large hole, or "blowhole," 120 meters long by nine meters wide. (App.2-3,25).[5]

It is undisputed that the submerged lands and associated natural resources at issue are owned by the State of Florida and located within the Florida Keys National Marine Sanctuary.

The Respondent United States (on behalf of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration) brought an action in the United States District Court for the Southern District of Florida against Coastal and Great Lakes under the NMSA for the destruction caused to the sanctuary resources. The State of Florida also filed a complaint against Coastal and Great Lakes which was consolidated with the federal case. (App.3,20).[6]

The first day of trial, Coastal settled its claims with the United States and the State of Florida for $618,484.86.

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[5] The parties are in dispute as to whether the Cavalier State, which received its orders from the Captain Joe, played any role in causing the blowhole damage. The Eleventh Circuit credited the district court's finding that "[s]ome combination of the Captain Joe's own engines and the Cavalier State's pulling during the failed attempts to extricate the tug had actually dragged the Captain Joe further along the bank." (App.10,25). The uncontroverted testimony, however, was that the propellers of the Captain Joe caused the blow hole – nothing else. (TT4/6/99 at 16,24,27; TT4/5/99 at 96,97,102,122,124,129-130).

[6] The State of Florida's complaint in admiralty sought damages under willful and negligent trespass theories. (R.2Doc.10).

The settlement satisfied Florida's claims against Great Lakes as well. (App.3,20).

After a bench trial, the district court granted in part and denied in part the relief sought by the United States. The court found Great Lakes strictly liable for all "response costs" and "damages" to the sanctuary under §1443(a)(1) of the NMSA. (App.3,6,30-33).[7] The court also ruled that the total damages assessed against Great Lakes would be offset by the government's $618,484.86 settlement with Coastal. (App.42).

The district court subsequently entered final judgment against Great Lakes in the amount of $368,796.97. (App.5,13).

On appeal by Great Lakes and cross-appeal by the United States, the Eleventh Circuit affirmed in part and reversed in part. (App.1-18). As it pertains to the questions presented in this petition, the Eleventh Circuit affirmed the district court's liability determinations as well as the reduction of the judgment by the amount of Coastal's settlement.

The Eleventh Circuit rejected Great Lakes' argument that the United States had no claim for "damages" because the submerged land and associated resources at

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[7] Pursuant to the NMSA, "response costs" include costs of actions taken to minimize the destruction of sanctuary resources. 16 U.S.C. §1432(7). "Damages," on the other hand, include compensation for (1) the cost of restoring, replacing, or acquiring the equivalent of a sanctuary resource and the interim loss value of the resource pending restoration; (2) damage assessment costs; and (3) reasonable monitoring costs. *Id.* §1432(6).

issue were owned by the State of Florida and the United States had no proprietary interest therein as required under *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed.2d 290 (1927). The court of appeals held that the United States could recover the damages claimed in this case under the express terms of the NMSA and the Florida Keys National Marine Sanctuary Act. (App.6-7).

The Eleventh Circuit also determined that Great Lakes was strictly liable under §1443 of the NMSA, that "each defendant [i.e., Great Lakes and Coastal] is a legal cause of the damage," and that the injury was not solely caused by Coastal for purposes of establishing the "third party" statutory defense under §1443(a)(3)(A). (App.10-13).[8] In doing so, the court of appeals failed to address Great Lakes' argument that it was not liable under admiralty law's longstanding "assist tug" defense or the "superseding cause" doctrine set forth in *Exxon Company, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996).

Finally, the Eleventh Circuit rejected Great Lakes' alternative argument that, by reason of the pre-trial settlement between the United States and Coastal, Great Lakes' liability had to be calculated under the "proportionate share" approach set forth in *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994). The court of appeals approved of the district

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[8] To support its finding that Great Lakes' conduct gave rise to statutory liability, the court of appeals focused on Great Lakes' acts and omissions in the preparation and maintenance of the pipe rafts. (App.10).

court's dollar-for-dollar reduction of Great Lakes' liability by Coastal's $618,484 settlement amount. The Eleventh Circuit found the "proportionate share" approach inapplicable on the stated basis that Great Lakes and Coastal were jointly and severally liable under the NMSA and the damages were indivisible between the two. (App.12-13).[9]

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's application of a dollar-for-dollar/pro tanto setoff of Coastal's settlement and refusal to calculate Great Lakes' liability under the "proportionate share" approach on the asserted basis that liability under the NMSA is joint and several squarely conflicts with this Court's decision in *McDermott, Inc. v. AmClyde* and other lower court decisions interpreting *AmClyde*.

This Court's decision in *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994) constitutes binding precedent and the Eleventh Circuit's failure to follow *AmClyde* is grounds for certiorari review. While Great Lakes contends that it was improperly found liable

[9] As reflected in its opinion, the Eleventh Circuit also rejected Great Lakes' contention that the district court misapplied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and erred in awarding damages based on the Habitat Equivalency Analysis. (App.7-9). On cross-appeal, however, the Eleventh Circuit agreed with the United States that the district court erred in its damage assessment. The opinion reverses and remands for the district court to reassess whether a "no action" plan is appropriate for primary restoration of the grounding site. (App.13-17).

to the United States under NMSA, assuming arguendo that Great Lakes is liable, the Eleventh Circuit plainly erred in refusing to give Great Lakes a settlement credit based on the "proportionate share" approach set forth in *AmClyde*.

The Eleventh Circuit rejected Great Lakes' alternative argument that it is only liable for its proportionate share of damages and affirmed the district court's dollar-for-dollar or pro tanto setoff of Coastal's $618,484.86 settlement. The Eleventh Circuit's ruling was based on its determination that Great Lakes and Coastal are jointly and severally liable under the NMSA where "each defendant is a legal cause of the damage and the damage is indivisible between the two." (App.12-13).

Respectfully, the Eleventh Circuit's holding is in direct conflict with this Court's decision in *McDermott, Inc. v. AmClyde* as well as with lower court decisions interpreting *AmClyde*. The proportionate share approach, and not the pro tanto approach, governed the setoff of Coastal's pre-trial settlement. Precisely as in *AmClyde*, this case involves a voluntary settlement and not a judgment against multiple defendants. Moreover, application of the proportionate share approach would not be precluded by or inconsistent with the imposition of joint and several liability under the NMSA. The fact that injury/damages may be indivisible does not preclude the equitable apportionment of *fault* for that injury. Further, not only has *AmClyde*'s proportionate share approach been applied to setoff determinations under other federal statutes but federal/maritime common law should in any event be used to fill the interstices of the NMSA.

In *AmClyde*, this Court addressed the issue as to how nonsettling defendants in federal maritime cases are entitled to credit when a plaintiff settles with one of several joint tortfeasors. 511 U.S. at 208. The Court rejected the pro tanto or dollar-for-dollar credit approach and ruled that the proportionate share approach applied. Under the latter approach, the settlement diminishes the claim the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor. *Id.* at 209. Significantly, this Court expressly held that the proportionate share approach does not in any way conflict with the rule of joint and several liability. The Court reasoned:

> *[T]here is no tension between joint and several liability and a proportionate share approach to settlements.* (footnote omitted). Joint and several liability applies when there has been a judgment against multiple defendants. It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than the innocent plaintiff, responsible for the shortfall. *Ibid.* (footnote omitted). Unlike the rule in *Edmonds [v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2573, 61 L.Ed.2d 521 (1979)], *the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to*

> *the other defendants, who were not parties to the settlement. Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement . . . so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one.*

511 U.S. at 220-221.[10]

Other circuit and lower courts have likewise recognized that *AmClyde*'s proportionate share approach is not precluded by or in conflict with principles of joint and several liability. In *Westinghouse Credit Corp. v. M/V New Orleans*, 39 F.3d 553 (5th Cir. 1994), for example, the Fifth Circuit stated:

> . . . Under the proportionate share approach, the finder of fact must determine the total damages from all joint causes and the proportion of each tortfeasor's share of joint liability. *Although principles of joint and several liability survive, a nonsettling defendant cannot initially be assessed any amount of damages larger than his proportionate share of all damages as determined by his proportionate share of all liability. Thus, under AmClyde, the nonsettling defendant is no longer entitled to a "credit" based on prior settlements. Rather, under AmClyde, it is the plaintiff who takes the risk of either a poor settlement or a favorable settlement with other defendants. However, the proportionate share rule, like its predecessor the pro tanto rule, applies only in cases in which there has been a settlement by a joint tortfeasor. . . .*

39 F.3d at 554-555.

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[10] Unless otherwise noted, all emphasis has been supplied by counsel.

Similarly, in applying the proportionate share approach to calculate a settlement setoff in a federal securities action, the court in *In re Kendall Square Research Corp. Sec. Litigation*, 869 F. Supp. 53 (D. Mass. 1994) discussed *AmClyde* and "how *the proportionate share approach is entirely consistent with the principles of joint and several liability.*" *Id.* at 55. The district court concluded that *"[t]he proportionate fault approach [ ] requires apportionment of fault among jointly and severally liable tortfeasors."* *Id.*

The Eleventh Circuit's rejection of the proportionate share rule and affirmance of the district court's pro tanto setoff of Coastal's pre-trial settlement is clearly at odds with *AmClyde*. To the extent Great Lakes could have been found jointly and severally liable with Coastal under the NMSA, such a finding permitted application of the proportionate share rule. *See Banks v. Yokemick*, ___ F.Supp.2d ___, 2001 WL 1549229 *20 (S.D. N.Y. December 3, 2001) (*AmClyde proportionate share setoff rule applies to the extent defendants were jointly and severally liable for the same injury*).

The fact that an injury may be indivisible hardly precludes the equitable apportionment of fault/responsibility for that injury. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 408, 95 S.Ct. 1708, 1715-16, 44 L.Ed.2d 251 (1975); *see also Expressions at Rancho Niguel Association v. Ahmanson Developments, Inc.*, 103 Cal.Rptr.2d 895, 898 (Ct. App. 2001) (under equitable indemnity principles, allocation of damages between defendants who are jointly and severally liable for an indivisible injury is based on each defendant's respective fault); *Kapsis v. Port Authority of New York and New Jersey*, 712 A.2d 1250, 1256-1257 (N.J. App.), *cert. den.*, 724 A.2d 803 (N.J. 1998)

(indivisibility of causation of plaintiff's injury does preclude factfinder to judge relative culpability of each party's acts).[11]

Further, while the Eleventh Circuit's only stated basis for not applying the proportionate share rule in this case is the alleged existence of joint and several liability for indivisible damage, any argument that *AmClyde* is otherwise inapplicable to federal statutes such as the NMSA would be untenable. Courts have repeatedly applied *AmClyde*'s proportionate share approach (also referred to as the "proportionate judgment reduction method") to cases involving federal statutory liability schemes and irrespective of their connection to admiralty law. *See, e.g., Eichenholtz v. Brennan*, 52 F.3d 478, 487 & n.16 (3d Cir. 1995) (federal securities and RICO statutes); *Banks*, ___ F.Supp.2d ___, 2001 WL 1549229 at *10-*22 (federal civil rights statutes); *Local 875 I.B.T. Pension Fund v. Pollack*, 49 F. Supp.2d 130, 133 (E.D. N.Y. 1999) (federal securities, RICO and ERISA statutes); *Slaven v. BP America, Inc.*, 958 F. Supp. 1472, 1475 (C.D. Cal. 1997) (federal TAPAA Act); *In re Kendall Square Research Corp. Sec. Litigation*, 869 F. Supp. at 55 (federal securities laws); *TBG, Inc. v. Bendis*, 160 F.R.D. 621, 623 (D. Kan. 1995) (federal securities laws).

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[11] Ironically, another panel from the Eleventh Circuit recently interpreted the *AmClyde* proportionate share rule as extending not only to situations where the settling and nonsettling defendants are joint tortfeasors but to situations where the defendants act together to cause a single indivisible injury. *See Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1377 (11th Cir. 2000).

Moreover, there are no setoff or contribution provisions of the NMSA evincing any Congressional intent that courts not apply the proportionate share rule. Accordingly, *AmClyde* must be used to "resolve 'interstitial' questions that Congress has left open in federal statutory schemes." *See Banks*, ___ F.Supp.2d ___, 2001 WL 1549229 at *11. Courts have recognized that *AmClyde* extends beyond maritime actions and constitutes a "federal common law rule of decision." *See id.* at *14.

Respectfully, because the Eleventh Circuit's decision turns *AmClyde* on its proverbial head, certiorari review should be granted. The proportionate share rule applies irrespective of whether liability is joint and several under the NMSA or whether the damage is indivisible. Any liability of Great Lakes must be reduced by the amount of Coastal's proportionate share of fault.

II. The Eleventh Circuit has decided important questions of federal law regarding the interpretation of the liability, damage and defense provisions of the NMSA which should be settled by this Court.

A. Because Congress incorporated the maritime rule of *Robins Dry Dock* in the NMSA, the United States was barred from recovering damages under 16 U.S.C. §1443 where the lands and associated natural resources at issue are owned by and under the jurisdiction of the State of Florida and the United States has no proprietary interest therein.

The Eleventh Circuit's determination that the NMSA does not incorporate the longstanding "proprietary interest" rule set forth in *Robins Dry Dock & Repair Co. v. Flint*,

275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) disregards settled principles of statutory construction. Not only must the NMSA be read with a presumption favoring the retention of time-honored maritime principles, but Congress specifically declined to include the language used in other environmental liability statutes which courts and commentators have found as demonstrating Congressional intent to preempt the *Robins Dry Dock* rule. Moreover, under the express terms of the NMSA, a person is only liable to the United States for the destruction of a sanctuary resource within a "marine environment" which is limited to "submerged lands over which the *United States* exercises jurisdiction." 16 U.S.C. §1432(3). Where, as here, the property at issue is indisputably state-owned, and the United States has no proprietary interest therein, the United States has no statutory right to recover damages.

The issue whether environmental liability statutes such as the NMSA incorporate or preempt the longstanding *Robins Dry Dock* rule is of great public significance and has yet to be addressed by this Court. *See* Tankersley, "The Robins Dry Dock Rule: The Tar Baby of Maritime Tort Law," 25 Tul. Mar. L.J. 371, 401-404 (2000). Pursuant to *Robins Dry Dock*, a plaintiff in a maritime tort action must suffer physical damage to a proprietary interest in order to recover economic damages. *E.g., Reserve Mooring, Inc. v. American Commercial Barge Line, LLC*, 251 F.3d 1069, 1070 (5th Cir. 2001).

In the case at bar, the Eleventh Circuit specifically rejected Great Lakes' argument that *Robins Dry Dock* was incorporated in the NMSA so as to bar the United States from recovering damages. (App.6). The Eleventh Circuit

found this argument contrary to the "express language and scheme of the relevant statutes." (App.6). The court of appeals reasoned that §1443(a)(1) of the NMSA authorized the United States to recover damages for injury to a sanctuary resource,[12] and that the seagrass resources at issue were within the Congressionally designated Florida Keys National Marine Sanctuary. (App.6-7).

Respectfully, the Eleventh Circuit's analysis disregards not only settled principles of statutory construction but the plain text of the NMSA.

Statutes which invade general maritime law are read with a presumption favoring retention of long established principles except when a statutory purpose to the contrary is evident. *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). Further, courts must assume that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

There are no statutory provisions within the NMSA, which was first promulgated in 1988,[13] showing

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[12] 16 U.S.C. §1443(a)(1) provides in relevant part:

> Any person who destroys, causes the loss of, or injures any sanctuary resources is liable to the United States for an amount equal to the sum of –
>
> (A) the amount of response costs and damages resulting from the destruction, loss, or injury. . . .

[13] *See* P.L. No. 100-627, 1988 H.R. 420, 102 Stat. 3213 (1988); S. Rep. No. 595, 100th Cong., 2d Sess. (1988). Sections 1431-1445 of the Marine Protection, Research and Sanctuaries Act were amended and redesignated as the National Marine Sanctuaries Act in 1992 and 1996. *See* P.L. No. 102-587, 1992 H.R. 5617, 106

Congressional intent to disavow the longstanding proprietary interest rule. To the contrary, Congress' purposeful non-inclusion of language which courts and commentators have found to evince an intent to preempt the *Robins Dry Dock* rule in other environmental liability statutes fully demonstrates the maritime doctrine's retention in the NMSA.

In *In re the Glacier Bay*, 746 F. Supp. 1379 (D. Alaska 1990), for example, the court faced the issue whether the *Robins Dry Dock* rule was incorporated in or preempted by the strict liability provisions of the Trans-Alaska Pipeline Authorization Act ["TAPAA"], 43 U.S.C. §1651 *et seq.* 746 F. Supp. at 1382-1386. In determining that the maritime rule of *Robins Dry Dock* was preempted, the court focused on Congress' inclusion of the statutory language *"[n]otwithstanding the provisions of any other law"* under §1653(c)(1). 746 F. Supp. at 1384. Based on the Second Circuit's interpretation of the same "notwithstanding"-proviso in the Federal Water Pollution Control Act ["FWPCA"], 33 U.S.C. §1321(f)(1), *see In the Matter of the Complaint of Oswego Barge Corp.*, 664 F.2d 327, 339-340 (2d Cir. 1981), the court construed the language in TAPAA to mean that the strict liability for environmental harm under §1653(c)(1) "was not to be modified by any preexisting law, whatever its source." 746 F. Supp. at 1384. Accordingly, the court held that TAPAA's strict liability and damage provisions did not incorporate the maritime common law rule of *Robins Dry Dock. Id.* at 1385-1386. *See also In re the Exxon Valdez*, 1995 A.M.C. 1397, 1993 WL 787392 *2-*6 (D. Alaska 1993) (finding

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Stat. 5039 (1992); P.L. No. 104-283, 1996 H.R. 543, 110 Stat. 3363 (1996).

"Congress partially abrogated federal maritime law, including *Robins Dry Dock*, in enacting TAPAA").

As it did with TAPAA and the FWPCA (also known as the Clean Water Act ["CWA"]), Congress also purposefully included a broadly worded "notwithstanding"-clause in the strict liability provisions of the Oil Pollution Act ["OPA"], 33 U.S.C. §2701 *et seq.* *See id.* at §2702(a)(1). Noting that oil pollution has become a major political and legislative issue, commentators have concluded that Congress specifically did this to preempt application of the *Robins Dry Dock* rule to these statutory schemes. *See* Tankersley, *supra*, 25 Tul. Mar. L.J. at 403-404; *see also Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630-631 n.6 (1st Cir. 1994) ("[m]ost commentators have read [OPA] – as its language and legislative history suggest – to override the *Robins Dry Dock* rule").

Significantly, Congress likewise inserted a preemptive "notwithstanding"-clause in the strict liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"], 42 U.S.C. §9601 *et seq.* While worded differently than the clauses found in TAPAA, FWPCA and OPA, the language included in §9607 of CERCLA ostensibly indicates a Congressional intent to preclude application of the *Robins Dry Dock* rule to that statutory liability scheme. Section 9607(h) provides:

> The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title *notwithstanding* any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) [46 App. U.S.C.A. §§ 182, 183, 184 to 188] or *the absence of any physical damage to the proprietary interest of the claimant.*

While it has been stated that the liability and damage provisions of the NMSA were generally modelled after those contained in the FWPCA/CWA and CERCLA, *see United States v. M/V Miss Beholden*, 856 F. Supp. 668, 670 (S.D. Fla. 1994); H.R. Rep. No. 100-739, 100th Cong., 2nd Sess., Pt. I, at 22 (1988), the noticeable absence of a comparable "notwithstanding"-clause in the NMSA cannot simply be ignored when discerning whether Congress intended to include or preempt the *Robins Dry Dock* rule in the NMSA.

To be sure, like CERCLA, the NMSA also contains a discrete limitation of liability subsection. Section 1443(a)(4) provides:

> Nothing in sections 175, 181 to 183, and 183b to 188 of the Appendix to Title 46 or section 192 of the Appendix to Title 46 shall limit the liability of any person under this chapter.

Unlike §9607(h) of CERCLA, however, §1443(a)(4) of the NMSA contains no language indicating preemption of the *Robins Dry Dock* rule. The Eleventh Circuit plainly erred in failing to consider Congress' purposeful decision not to include any preemptive language in the NMSA. *Cf. Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 22, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (comparing similarity between MPRSA and FWPCA).

That Congress intended to incorporate the *Robins Dry Dock* rule in the NMSA and preclude the United States from recovering damages where the submerged land and natural resources at issue are state-owned and the United

States has no proprietary interest therein is also evidenced by the language actually used in the NMSA. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). Pursuant to the definitions contained in the NMSA, liability to the United States is limited to situations where injury is caused to submerged lands over which the United States federal government, as opposed to individual States or foreign nations, have jurisdiction.

Under §1443(a)(1), a person may only be liable to the United States for causing injury to a "sanctuary resource." Pursuant to the definitions contained in the NMSA, a "sanctuary resource" must be part of a "national marine sanctuary."[14] A "national marine sanctuary," in turn, must be part of a "marine environment."[15] And under §1432(3), " 'marine environment' means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and *submerged lands over which the United States exercises jurisdiction*, including the exclusive economic zone, consistent with international law."

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[14] 16 U.S.C. §1432(8) provides:

> "sanctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary[.]

[15] 16 U.S.C. §1433(a) provides in relevant part:

> The Secretary may designate any discrete area of the marine environment as a national marine sanctuary. . . .

While the term "jurisdiction" is not defined in the NMSA, courts focusing on Congress' usage of that term in the Submerged Lands Act ["SLA"], 43 U.S.C. §1302, and the Outer Continental Shelf Lands Act ["OCSLA"], 43 U.S.C. §1331(a), have concluded that the term "delineat[es] *the relative powers of the United States federal government on the one hand and the governments of other countries and of the several states on the other.*" *See Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1205-1206 (5th Cir. 1988).

Here, as defined under the NMSA, the property where the pipe scar and grounding incidents occurred was subject to the "jurisdiction" of the sovereign State of Florida and not the United States federal government. Thus, the United States had no statutory right to recover damages. *See United States v. Ray*, 423 F.2d 16, 18-22 (5th Cir. 1970) (United States could not recover damages, had they been sought, for tortious injury to submerged coral reefs outside of United States' jurisdiction under OCSLA where United States had no property right in submerged reefs); *see also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 338-340 (5th Cir. 1978) (United States could not claim interest in wrecked vessel under Antiquities Act, 16 U.S.C. §431 *et seq.*, where wreck was located on submerged lands outside of jurisdiction of United States).

To be sure, given that the submerged lands at issue were within the State of Florida's jurisdiction, and the United States had not otherwise been given any proprietary interest in such lands, the United States simply had no *constitutional* power to recover damages for injury to such State property rights. *Cf. Pollard v. Hagan*, 44 U.S.

212, 230, 3 How. 212, 11 L.Ed. 565 (1845) ("Th[e] right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it."); *cf. also United States v. California*, 436 U.S. 32, 41, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978) (holding that, by operation of Submerged Lands Act, State of California has dominion over and proprietary interest in submerged lands).

While the United States federal government certainly has sovereign power to *regulate conduct or recuperate federal costs actually incurred within a State's territorial jurisdiction*, such power must be distinguished from a State's sovereign right to *recover damages for injury to proprietary interest in lands owned by the State. See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 327-335, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973) (distinguishing Federal Act which permits recovery of cleanup costs incurred by federal government as a result of oil spills in state territorial waters with Florida Act which permits State to recover for damages to property interests); *cf. In the Matter of the Complaint of Allied Towing Corp.*, 478 F. Supp. 398, 402-404 (E.D. Va. 1979) (where FWPCA permits recovery for cleanup or replacement costs actually incurred by government, defendant's settlement with United States for FWPCA liability did not satisfy Virginia's state law claim for damages to state-owned natural resources and property).

Respondent will likely argue that Great Lakes' position is belied by the terms of the Florida Keys National Marine Sanctuary and Protection Act ["FKNMSPA"],

Pub. L. No. 101-605, 104 Stat. 3089 (1990), *amended by* Pub. L. No. 102-587, 1992 H.R. 5617, 106 Stat. 5039 at §2209 (1992), which designated areas within the State of Florida including the submerged lands at issue, as well as §1443(d)(3) of the NMSA which provides:

> Amounts recovered under this section with respect to sanctuary resources lying within the jurisdiction of a State shall be used under paragraphs (2)(A) and (B) in accordance with the court decree or settlement agreement and an agreement entered into by the Secretary and the Governor of that State.

Neither the FKNMSPA nor §1443(d)(3), however, resolve the significant issues of statutory construction presented by this case.

First, the relevant liability and damage provisions of §1443(a)(1) are expressly tied to the definitions set forth in §1432. The State of Florida, and not the United States federal government, owns and exercises "jurisdiction" over the submerged lands at issue. Further, the State of Florida's non-objection to the inclusion of state-owned lands in the sanctuary designated in the FKNMSPA was not a relinquishment of State jurisdiction or sovereignty. *See* FKNMSPA at Section 5(c). Indeed, the United States appears to have recognized this principle in formulating the regulations governing the FKNMSPA: "The [Florida] Board of Trustees has not conveyed title or relinquished authority over any state-owned lands or other state-owned resources by agreeing to include state-owned land within the Sanctuary boundary." 62 Fed.Reg. 32156 (1997).

Second, the language used in §1443(d)(3) only strengthens the proffered interpretation of the term "jurisdiction" in §1432(3). Congress was fully aware of the critical difference in meaning between the "jurisdiction of a State" (§1443(d)(3)) and the "jurisdiction" of the "United States" (§1432(3)).

Third, and significantly, the Eleventh Circuit's opinion does not discuss or even cite §1443(d)(3). And for good reason. The requirements of this subsection have not been satisfied. There is no evidence of any agreement in place between the Secretary and Governor of Florida.

Fourth, if §1443(d)(3) somehow creates an ambiguity in the interpretation of NMSA, it is all the more reason why this Court should undertake certiorari review. Further, the FKNMSPA does not contain any damage or liability provisions and merely states under Section 5(a) that the designated "Sanctuary shall be managed and regulations enforced under all applicable provisions of [the NMSA] as if the Sanctuary had been designated under such title." The terms of the FKNMSPA reflect the federal government's authority to *regulate conduct* but are totally silent as to any alleged authority to *recover damages* for injury to a proprietary right.

And fifth, even if §1443(a)(1) could be construed as permitting the recovery of damages for injury to submerged lands over which a sovereign State exercises jurisdiction, pursuant to *Robins Dry Dock*, the statute must in any event be read as only embracing those state-owned lands wherein the United States has otherwise obtained a proprietary interest such as, perhaps, by express contractual assignment. *See Arnold M. Diamond, Inc. v. Gulf Coast*

Trailing Co., 180 F.3d 518, 523-524 (3d Cir. 1999) (finding question of fact whether there was an assignment agreement between company and United States Navy to permit circumvention of *Robins Dry Dock* doctrine).

In the case at bar, there is no record evidence that the State of Florida relinquished or assigned its proprietary interest to the United States. To the contrary, Florida brought its own damages action against Great Lakes and Coastal which was settled and set off from the judgment in favor of the United States.

Lastly, the Eleventh Circuit overlooked the significant ramifications of construing the NMSA to impose liability upon a private party where the land is owned by one sovereign yet the damages are to be paid to another sovereign. State and federal governments often disagree and contest their respective interests. *See United States v. Florida*, 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976). Private parties should not be placed in the middle. Moreover, what if the injuries alleged in this case had been caused by vessels owned or operated by the State of Florida? It cannot be said that the federal government has a right of action against Florida for injuries to natural resources owned by Florida. If the United States cannot maintain a cause of action against Florida for injuries to state-owned land, then, under the NMSA, the United States is no more able to assert a claim for damages inflicted by a private party to state-owned land.

B. Great Lakes was entitled to assert maritime law's "superseding cause" and "assist tug" defenses which were not preempted by the NMSA.

In holding Great Lakes strictly liable to the United States, the Eleventh Circuit also erroneously precluded Great Lakes from relying upon maritime law's "superseding cause" and "assist tug" defenses. This Court should grant certiorari review and clarify that such defenses are available in an action under §1443 of the NMSA and are to be decided by the trier of fact.

Although the Eleventh Circuit specifically found that both Coastal and Great Lakes contributed to the indivisible damage so as to form a basis for joint and several liability (App.12), the court failed to consider whether Coastal's actions were in fact the "superseding cause" so as to relieve Great Lakes of liability under this Court's decision in *Exxon Company, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996). Under *Sofec*, " 'the doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable.' " *Id.* at 837. The superseding cause issue "is left to the factfinder, subject to limited review." *Id.* at 840-841.

Here, Great Lakes contends that any causal negligence on its part as it pertains to the preparation and maintenance of the pipe raft was plainly superseded by the unforeseeable actions of the crew of Coastal's Captain Joe which ran aground and caused the blow hole.

(App.10,21-25). Had the Captain Joe stopped and reported either of the grounding incidents, as legally required by 46 C.F.R. §§4.05-1 & 4.03-1(b), or waited for daylight to view the situation, or sought assistance, no blow hole damage would have occurred. Pursuant to *Sofec*, the district court, as trier of fact, was duty-bound to determine whether the actions of Coastal effectively cut off Great Lakes' liability.

In determining that there was sufficient evidence of "causation" to impose liability under the NMSA, the Eleventh Circuit also referenced the actions of Great Lakes' assist tugs during the voyage.[16] The Eleventh Circuit completely overlooked, however, that, under well established principles of maritime law, an assist/helper tug cannot be held responsible for merely obeying orders. *See, e.g., The 'Connecticut'*, 103 U.S. 710, 712, 13 Otto 710, 26 L.Ed. 467 (1880); *Baker Carver & Morrell Ship Supplies, Inc. v. Mathiasan Shipping Co.*, 140 F.2d 522, 525 (2d Cir. 1944); *Diesel Tanker Ira S. Bushey, Inc. v. Tug Bruce A. McAllister*, 1995 A.M.C. 806, 1994 WL 320328 *11 (S.D. N.Y. 1994).

Here, the district court expressly found that "at all times during the trip, [Great Lakes'] Volunteer State was to receive its instructions from [Coastal's] Miss Necie" and "[Great Lakes'] Cavalier State was to receive its instructions from [Coastal's] Captain Joe." (App.21). Great Lakes cannot be held liable where its assist tugs did

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[16] For example, the Eleventh Circuit relied upon the factual finding that "[s]ome combination of the Captain Joe's engines and the efforts of Great Lakes' tug, the Cavalier State, dragged the Captain Joe farther along the bank." (App.10).

nothing more than follow the orders of Coastal and the government authorities involved in extricating the Captain Joe.

Respondent will likely argue that the "superseding cause" doctrine and "assist tug" defense are preempted and inapplicable to an action under §1443 of the NMSA. Respondent contended below that, pursuant to §1443(a)(3)(A), the NMSA only allows a defense where the injuries are "caused solely" by the actions of the "third party" and that, here, both Coastal and Great Lakes contributed to the damage.[17]

There is nothing in the NMSA, however, to suggest that the defenses listed in §1443(a)(3) are exclusive. To the contrary, the fact that Congress saw fit to only state in §1443(a)(4) that various other statutory sections do not limit liability demonstrates that other maritime defenses are not preempted. As detailed above, Congress did not include in the NMSA the "notwithstanding the provisions of any other law"-proviso as it did in the FWPCA/CWA, OPA and TAPAA which would have demonstrated Congressional intent that the strict liability provisions not be modified by preexisting common law. *See* 33 U.S.C. §1321(f)(1); 33 U.S.C. §2702(a)(1); 43 U.S.C. §1653(c)(1); *see*

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[17] 16 U.S.C. §1443(a) provides in relevant part:

(3) Defenses

A person is not liable under this subsection if that person establishes that –

(A) the destruction or loss of, or injury to, the sanctuary resource was caused solely by an act of God, an act of war, or an act or omission of a third party, and the person acted with due care. . . .

also, e.g., In the Matter of the Complaint of Oswego Barge Corp., 664 F.2d at 339-340.

Further, the "causation" requirement in the NMSA is set forth under the provisions of §1443(a)(1). Maritime law's "proximate causation requirement, and the related superseding cause doctrine" must therefore be deemed incorporated into the statute's liability provisions. *See Sofec*, 517 U.S. at 836. There is no evidence that Congress intended to preempt federal maritime or common law in this regard. *See, e.g., Barnes v. Andover Company, L.P.*, 900 F.2d 630, 637 (3d Cir. 1990) ("statutes 'invad[ing]' common law or general maritime law are read with a presumption toward retaining familiar principles").

Accordingly, because the Eleventh Circuit's interpretation of the NMSA conflicts with settled principles of statutory construction, and further because this case involves an environmental liability scheme of significant public importance, certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS,

FOR THE ELEVENTH CIRCUIT

D.C. DOCKET No. 97-02510-CV-EBD

UNITED STATES OF AMERICA,

Plaintiff-Appellee-
Cross-Appellant,

INTERNAL IMPROVEMENT TRUST FUND, et al,

Plaintiffs-Appellees,

versus

GREAT LAKES DREDGE & DOCK COMPANY,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(Filed July 30, 2001)

Before ANDERSON, Chief Judge, RONEY and FAY, Circuit Judges.

RONEY, Circuit Judge:

Defendant Great Lakes appeals the judgment against it in a suit for damages brought by the United States under the National Marine Sanctuaries Act for damage to the Florida Keys Marine Sanctuary caused by a grounded tugboat and dredge pipe. The government's cross-appeal

concerns the district court's ruling that no primary restoration is required for the grounding site. We affirm the district court's decision on liability, but we vacate a portion of the damages award, specifically that no action is the best alternative for addressing damage at the grounding site. We remand for further factual findings regarding this question.

I. Facts

In May 1993, Great Lakes Dredge & Dock Company (Great Lakes) hired Coastal Marine Towing (Coastal) to tow 500-foot lengths of dredge pipe and other equipment from Boca Grande to Green Cove on the East Coast of Florida. Coastal supplied two tugs, Captain Joe and Miss Necie and their crews. Great Lakes supplied two assist tugs, Volunteer State and Cavalier State.

While proceeding through the Florida Keys National Marine Sanctuary, one of the pipes in a raft towed by Miss Necie dragged the sea bottom creating a pipe scar approximately 13 miles long.

The following facts caused grounding site damage which is the subject of this appeal. Due to a navigational error by Miss Necie, the flotillas got off course and Captain Joe ran aground in seven feet of water trying to pass Miss Necie. Great Lakes' assist tug, Cavalier State, was tied to the Captain Joe. Sanctuary and state officials helped devise a plan to extricate Captain Joe. At high tide, Captain Joe was powered off the bank by a combination of its own motor and the Cavalier State. The grounding left behind a channel 120 meters long, eight to ten meters wide and two meters deep. The grounding

destroyed 7,495 square meters of sea bottom, consisting of turtle grass, manatee grass and finger coral. The boats also created a large hole, or "blowhole," 120 meters long by nine meters wide.

The United States brought this action on behalf of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) under the National Marine Sanctuaries Act (NMSA) of 1972, as amended, 16 U.S.C. § 1431-1445, for the destruction caused by the grounding of the sanctuary resources, primarily seagrasses, in the marine sanctuary. The State of Florida also filed a complaint against defendants, which was consolidated with the federal case. The first day of trial, Coastal settled its claims with the United States and the State of Florida for $618,484. The settlement satisfied Florida's claims against Great Lakes as well, and Florida is not a party to this appeal. The State of Florida did file an amicus brief in support of the United States' positions concerning liability and damages, but argues only liability.

After an eight-day bench trial in April 1999, the district court granted in part and denied in part the relief sought by the government. The court ruled in favor of the United States on liability, finding that Great Lakes was strictly liable under the NMSA for all damages to the sanctuary. Regarding damages, the government sought compensation for implementation of both its primary restoration plan and its compensatory plan.

Under the primary restoration component of damages, the government is entitled to recover the cost of implementing its plan to restore or replace the injured

resource, or the cost of acquiring the equivalent of the sanctuary resource, if it cannot be restored or replaced. *See* 16 U.S.C. § 1432(6)(A). Both the government and Great Lakes agreed that the pipe scar recovered on its own in three years, so the damage caused is not a part of this appeal. As for the grounding site, the government proposed a plan to use imported sediment to fill and restore the grounding site, one of three alternative primary restoration plans considered by the government. The district court determined that another plan, the "no action" plan for the primary restoration of the grounding site was appropriate, but that the U.S. should recover the cost of physical and biological monitoring of the site.

The district court also held that the government was entitled to damages for compensatory restoration, which is compensation for the interim lost use of the resources at the pipe scar and grounding site during the period from destruction to recovery. *See* 16 U.S.C. § 1432(6)(A). Recovery for lost interim services is in the form of seagrass restoration projects at other suitable locations within the Sanctuary. The district court determined that the Prop Scar Restoration Program developed by the government is an appropriate compensatory restoration project that would provide seagrass services equivalent to those lost due to the injuries caused by Great Lakes at both the grounding site and the pipe scar. The court also held that the government's reliance on the Habitat Equivalency Analysis (HEA) was appropriate to scale the compensatory seagrass restoration project. Based on these determinations, the district court awarded to the government, its response and assessment costs; compensatory and monitoring costs; and permitting and supervision

costs. The district judge required the government to recalculate the appropriate damages by simple mathematical computations based on its findings of fact. On March 1, 2000, the district court entered final judgment against Great Lakes in the amount of $368,796.97, the figure after setting off the settlement amount paid by Coastal.

On appeal, Great Lakes argues the district court erred in finding Great Lakes liable to the United States because (1) suit by the United States not authorized under common law; (2) Great Lakes was not vicariously liable for Coastal's actions, and (3) the method used to assess restoration was faulty. On cross-appeal, the United States argues the district court erred in approving "no action" as the primary restoration plan for the grounding site.

II. Applicable Statutory Provisions.

The National Marine Sanctuaries Act governs the designation and management of federally protected marine areas of special significance. Congress enacted the NMSA in response to the increasing degradation of marine habitats and in recognition of the need to protect marine ecosystems. *See* S. Rep. No. 100-595, 2d Sess. 1 (1998), *reprinted in* 1988 U.S.C.C.A.N. 4387. The NMSA confers authority for the designation and management of marine sanctuaries on the Secretary of Commerce, 16 U.S.C. §§ 1433, 1434, who has delegated these responsibilities to the NOAA.

The NMSA imposes civil liability on "any person who destroys, causes the loss of or injures any sanctuary resource." 16 U.S.C. § 1443.

The Attorney General, at the request of the Secretary, may commence an action against any person or vessel who is liable for response costs and damages. 16 U.S.C. § 1443(c). "Response costs" include costs of actions taken to minimize the destruction of sanctuary resources. § 1432(7). "Damages" include compensation for (1) the cost of restoring, replacing, or acquiring the equivalent of a sanctuary resource and the interim loss value of the resource pending restoration; (2) damage assessment costs, and (3) reasonable monitoring costs. 16 U.S.C. § 1432(6).

3. Discussion.

1. Whether the National Marine Sanctuaries Act Authorizes Damages to the United States Government for Injuries to Sanctuary Resources.

At the outset, we reject Great Lakes' argument that the government has no claim for damages in this case because the property at issue is state-owned and the United States therefore has no proprietary interest. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308 (1927). This argument belies the express language and scheme of the relevant statutes. On November 6, 1990, Congress enacted the Florida Keys National Marine Sanctuary Act (the "Sanctuary Act"), Pub.L. No. 101-605, 104 Stat. 3089 (1990), which designated 2800 nautical miles of coastal water in the Florida Keys as the Florida Keys National Marine Sanctuary. The Sanctuary Act provides that "[t]he Sanctuary shall be managed and regulations enforced under all applicable provisions of [the NMSA] as if the Sanctuary had been designated" thereunder.

Sanctuary Act, § 5(a). In this case, the United States seeks damages from defendants for a violation of § 1443 of the NMSA, which imposes strict liability for damage or injury to any sanctuary resource. *See, e.g., United States v. M/V Jacquelyn L.*, 100 F.3d 1520, 1521 (11th Cir. 1996); 16 U.S.C. § 1443(a)(1). The NMSA plainly authorized the United States to recover the damages it seeks for injuries to seagrass resources. The NMSA explicitly provides, "Any person who destroys, causes the loss of, or injures any sanctuary resources is liable to the United States for an amount equal to the sum of . . . the amount of response costs and damages resulting from the destruction, loss, or injury. . . . " 42 [sic] U.S.C. § 1443(a)(1)(A).

2. Whether the District Court Erred in Awarding Damages Based on the Habitat Equivalency Analysis.

The United States sought damages under § 1432 of the NMSA for "the cost of . . . acquiring the equivalent of a sanctuary resource," and for the value of lost use of the resource "pending acquisition of an equivalent" resource. In other words, to compensate for damages sustained and for lost interim services at the blowhole and pipe scar sites, equivalent sites were selected for restorative or replacement actions. The Habitat Equivalency Analysis ("HEA") was used to scale (quantify the size of) the equivalent area to be restored, and therefore, to quantify the damages for lost interim services and the acquisition of equivalent resources.

Great Lakes argues that the district court erred in accepting the HEA for two reasons: *first*, use of an HEA is

not appropriate under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) as a methodology for determining damages in this case; and *second*, the underlying "scientific data" plugged into the mathematical equations as input parameters could not pass muster under *Daubert*.

The Supreme Court has interpreted the Federal Rules of Evidence to require scientific evidence to be both relevant and reliable. *See Daubert*, 509 U.S. at 795. In *Daubert*, the Supreme Court set forth four factors, among others, that a trial judge may consider in determining the reliability of scientific testimony: (1) whether a theory or technique can be and has been tested; (2) whether a theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of a particular scientific technique; and (4) whether a theory or technique has been generally accepted. *See Daubert*, 509 U.S. at 592-593. These factors do not constitute a definitive checklist, and courts have ample discretion to assess "whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology properly can be applied to the facts at issue." *See Daubert*, 509 U.S. at 592-93.

The district court did not abuse its discretion when it determined that use of the HEA was appropriate and that the underlying scientific data satisfied *Daubert*. Our review of the evidence indicates, contrary to Great Lakes' assertions, that the HEA was peer reviewed and accepted for publication prior to trial. See e.g. R13-151, 185-87, in which Dr. Brian Julius, who introduced the HEA, discussed the peer review and publication of the HEA.

Great Lakes remaining arguments address the quality of the data that went into the HEA and differing interpretations of the underlying data, all of which were adequately addressed by the district court. Specifically, Great Lakes challenges (1) the calculation of compensatory restoration, that is the validity of the data used to determine the recovery rates of the injured sites; (2) the feasibility of the compensatory sites as equivalent sites; the "compressed succession" technique, which is a planting technique that achieves a more rapid rate of seagrass recovery by temporarily substituting a faster growing species, Halodule, for the slower growing Thalassia, and then allows Thalassia to recolonize the stabilized area; and (3) the HEA's sensitivity to major changes in fundamental input parameters. The district court addressed these objections in its July 28, 1999 Order, stating that evaluation of the data put into the HEA and the arguments relating to data interpretation are relevant when the court, as fact finder, weighs the evidence and determines how much weight to give each experts' opinion. Our thorough review of the record reveals no error in the district court's acceptance of the HEA. We note that necessary modifications to the HEA were ordered by the court and complied with by the United States, arguably rendering the HEA more reliable.

3. *Whether the District Court Erred in Finding Great Lakes Vicariously Liable for the Actions of Coastal.*

Great Lakes argues it was held vicariously liable for damage when "[t]here was no proof at trial that Great Lakes' conduct violated this statute with respect to the blowhole," and "the trial court did not address whether the U.S. proved a *prima facie* case."

We hold that the district court's factual findings support the determination that Great Lakes' conduct gave rise to strict liability under the NMSA. Specifically, the court found Great Lakes was responsible for helping Coastal's vessels maneuver the tows, maneuver the 500-foot long pipe rafts, and assist with unanticipated problems. Great Lakes was responsible for preparing the pipe rafts and ensuring they were safe and seaworthy, and it failed to test the pipes before the trip. Great Lakes failed to send a welder or crane operator with the flotilla who could have made any needed repairs. Great Lakes failed to provide Coastal crews with any direction once notified about the sinking pipes and instead arranged for a welder and crane operator to meet the flotilla at Marathon. Great Lakes failed to notify the lead tugs that any pipes were dragging. The dragging pipes caused a 13-mile pipe scar. The dragging pipes slowed down the Miss Necie, which caused the Captain Joe to maneuver sharply to avoid a collision, resulting in running aground. Some combination of the Captain Joe's engines and the efforts of Great Lakes' tug, the Cavalier State, dragged the Captain Joe farther along the bank. The grounding and attempts to extricate the Captain Joe from the site resulted in injuries to sanctuary resources.

Contrary to Great Lakes assertions, these factual findings are supported by the record evidence and are not clearly erroneous. These facts are sufficient to demonstrate causation sufficient to impose liability under the NMSA.

Great Lakes argues that the district court improperly denied it the affirmative third-party defense under § 1443. The Act provides three defenses, only one of which is applicable to this case. Under the statute, a person is not liable if that person establishes that the injury to sanctuary resources was "caused solely by . . . an act or omission of a third party, and the person acted with due care." § 1443(a)(3)(A). This provision is substantively identical to those statutes upon which the NMSA was modeled, the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 311(f)(1), 33 U.S.C. § 1321(f)(2); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), § 101 et seq., 42 U.S.C.A. § 9607(b)(3). The district court correctly determined that under no view of the evidence could Great Lakes satisfy either of these elements of the defense.

The district court held Great Lakes was strictly liable, relying upon *United States v. LeBeouf Brothers Towing Co.*, 621 F.2d 787 (5th Cir. 1980), a case in which the Fifth Circuit, under a similar strict liability provision in the Clean Water Act, rejected the argument that an independent contractor acting for and under the control of a defendant employer is a "third party" for the purpose of absolving the defendant employer of liability under the statute. In that case, the Fifth Circuit rejected a vessel owner's argument that it was not liable under the third-

party defense provisions of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 311(f)(1), 33 U.S.C. § 132, for the accidental discharge of oil by an independent contractor tug crew hired by the defendant. The court concluded that the defendant held ultimate control over hiring the contractor, specifying its itinerary, and retaining the contractor throughout the job. *LeBeouf*, 621 F.2d at 789-90. The court also concluded that the third-party defense was not intended to protect a party from the acts or omissions of those acting under its control or on its behalf. 621 F.2d at 790. Otherwise, "the statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners like [defendant] could escape strict liability merely by hiring out their operations to tugs." 621 F.2d at 789. In this case, the district court correctly reasoned that the remedial purpose of the NMSA and the need to encourage oversight with independent contractors requires an equally strict reading of the NMSA's third-party defense.

Great Lakes has simply failed to prove that the injury was solely the result of Coastal's actions and that Great Lakes acted with due care. Great Lakes contends that even if it is liable, it should only pay for a proportional share of damages. Where, as in this case, however, each defendant is a legal cause of the damage and the damage is indivisible between the two, the district court correctly held that liability under the NMSA is joint and several. This holding is consistent with cases finding joint and several liability under the CWA and CERCLA. *See e.g., United States v. M/V Big Sam*, 681 F.2d 432, 438-39 (5th Cir. 1982) (CWA); *Redwing Carriers v. Saraland Apartments*, 94

F.3d 1489, 1512, 1513 (11th Cir. 1996) (CERCLA). The evidence supports the district court's findings of facts regarding joint and several liability. The court's factual findings indicate that Great Lakes caused damage at both the pipe scar and the blowhole. Although the district court did not expressly address the divisibility of the injuries, it is clear from the evidence Great Lakes' actions during the entire incident were inextricably tied with Coastal's actions. The resulting injuries cannot be attributed to any one defendant. Although the district court concluded that Great Lakes was jointly and severally liable, it did in fact reduce Great Lakes' liability by $618,484,86 [sic] or approximately two-thirds of the judgment, in recognition of Coastal's payment of that amount.

A review of Great Lakes challenges to the court's evidentiary rulings regarding the admission of affidavits with attached summaries and supporting documentation of two experts, Wiley Wright and Michelle McQuillan, reveal there to be no abuse of discretion in the various rulings.

4. *The United States' Cross Appeal.*

The United States' cross-appeal concerns the district court's ruling that "no action" is the appropriate plan for the grounding site. The government alleges that the district court erred in relying on the hearsay report of a non-testifying government consultant and clearly erred in certain factual determinations, including that natural recovery would occur in 70 years. It argues that approval of a "no action" plan is contrary to the NMSA and the agency's expert judgment.

As contemplated by the NMSA, the NOAA developed a restoration plan for the injured resources and the grounding site and the pipe scar. Under the NMSA, damages include: (1) the cost of replacing, restoring, or acquiring the equivalent of an injured sanctuary resource ("primary restoration"); (2) compensation for the interim loss of resources and services from the time of injury until resources recover to baseline ("compensatory restoration"); (3) damage assessment costs; and (4) reasonable monitoring costs. 16 U.S.C. § 1432(6). The agency recommended compensatory restoration for both the pipe scar and the grounding site. The agency did not recommend primary restoration for the pipe scar because it was recovering naturally in a timely manner, but it did recommend primary restoration for the grounding site.

The agency narrowed down to three the viable alternative plans for primary restoration of the grounding site: (1) a "no action" plan; (2) a site regrading plan; and (3) the "imported fill" plan. The government recommended the third option, the imported fill plan, but the district chose the no action alternative.

The court made the following findings: (1) it was not convinced the plan would restore the bank to its original condition; (2) it concluded the grounding site would be expected to fully recover on its own in roughly 70 years and (3) it raised concerns about potential construction risks. In reaching this conclusion, the court misinterpreted the evidence and testimony before it, and certain of these findings are not based on the evidence.

One of the more significant factual errors was the court's finding that natural recovery without any

interference would take approximately 70 years. The evidence clearly indicated that this seventy-year period upon which the district court relies is in fact the amount of time the grounding site is expected to achieve full biological recovery *after* implementing the United States' primary restoration plan. The Report from J. Harold Hudson, Regional Biologist, Key Largo National Marine Sanctuary, Exh. 18 states in the "PROGNOSIS FOR RECOVERY":

> Complete recovery of this site to pregrounding conditions is not expected to occur without human intervention . . . Infilling of channelized areas of the grounding site is an essential first step toward site recovery. If no other remedial action is taken it is anticipated that complete overgrowth of the site by seagrasses and corals to pregrounding levels could occur in 75 to 100 years.

The government's biologist, Judson Kenworthy, testified that the recovery horizon for the slower growing Thalassia grass was seventy-one years for an area the size of the injury at the grounding site. R-12-79, 81. Government expert Brian Julius, elaborated that the seventy-one-year recovery rate was based on the assumption that the government's primary restoration plan would be completed. R13-155-156, 170.

There is evidence in the record that natural recovery *without human intervention* would take much longer, as much as hundreds of years. Government expert Dr. Joseph Zieman testified that if the bank were left alone, recovery "would take a long, long time. Many, many decades to possibly hundreds of years." R-13-116.

Thus, the court's finding that the government's primary restoration plan will not decrease the recovery period is clearly erroneous.

The court also relies on report of Dr. Kevin R. Bodge, to support its statement that "the morphological signature of the injury will be visible for many years to come irrespective of what plan is implemented." As an initial matter, the government challenges the district court's reliance on the Bodge report at all, because Bodge was a non-testifying government consultant and his report was admitted into evidence for the limited purpose of explaining other experts' testimony. Assuming for purposes of this argument that the Bodge report was properly considered, the district court relied on it for evidence unsupported in either the report itself or other record evidence. The report only compared the no action alternative to a berm-transfer alternative, not the government's infill plan. The report therefore provided no opinion on the government's plan's potential effect on the sited morphology.

We must also note that the Bodge report's recommendation of "no action" was a qualified one based on several critical assumptions: that the banks are stable, the sediment is not chronically disturbed and the rubble is not susceptible to erosion. The court made no findings as to whether these underlying assumptions were met.

The evidence in the record indicates that biological recovery of the site's resources would eventually occur only after the site had been stabilized. Kenworthy testified that the site would remain unstable "[u]ntil the physical topography of that site is brought back to as near as it

was prior to the grounding event." R-12-113. *See also* McCabe's testimony, R-13-57-58 ("[i]f you do not fill it you are still going to be continually subject to hurricane wave impact . . . It is never going to stabilize."); and Zieman's testimony regarding the infill R-13-114 ("[M]y paramount recommendation is no matter what happened that [it tried] to fill in that crater in there and get it back to some type of near conforming bank top surface.")

The statutory scheme under the NMSA explicitly authorized the Secretary of Commerce, acting as trustee for sanctuary resources, to take "all necessary actions" to prevent or minimize the destruction or loss of, or injury to, the resources. 16 U.S.C. § 1443(b)(1). Under these circumstances, where several key findings made by the district court were based on misinterpretations of the record, we deem it necessary to remand for further consideration, with particular attention paid to the question whether the fact that it is the government's plan rather than the "no action" plan that provides for recovery in approximately seventy years, and how the other factors weigh in against that element. Recognizing that part of the court's order assumes the government will continue to monitor the effects of the no-action alternative, we assume the government will take this opportunity to update the court on any new information that would aid in the district court's decision.

By this decision, we do not intend to indicate that a "no-action" plan would not ultimately be the option of choice. But the choice, in which some discretionary judgment may be involved, should rest on correct findings of fact supported by evidence in the record.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
SOUTHERN DIVISION
IN ADMIRALTY
CASE NO. 97-2510-CIV-DAVIS/BROWN
CASE NO. 97-10075-CIV-DAVIS/BROWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREAT LAKES DREDGE & DOCK CO.,

Defendant.
_____/

BOARD OF TRUSTEES OF THE INTERNATIONAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA and FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiffs,

v.

GREAT LAKES DREDGE & DOCK CO.,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Sep. 27, 1999)

THIS CAUSE came before the Court on claims by the United States of America and the State of Florida against Great Lakes Dredge & Dock Company ("Great Lakes") and Coastal Marine and Towing ("Coastal") for damage caused by a grounded tugboat and dredge pipe to the Florida Keys National Marine Sanctuary. Plaintiffs sought damage and response costs pursuant to the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431, *et seq.*

On the first day of trial, both the United States and the State of Florida entered into a settlement agreement with Coastal, whereby all claims against Coastal were dismissed. The terms of the settlement agreement were set forth and approved by this Court on April 15, 1999. Under the agreement, the State of Florida's claims against Great Lakes were also satisfied. Thus, the United States proceeded to trial solely against Great Lakes.

The matter was tried before the Court from April 5, 1999 through April 14, 1999. The Court enters the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. To the extent that the Findings of Fact may be considered Conclusions of Law, they shall be so considered. Similarly, to the extent that the Conclusions of Law may be considered Findings of Fact, they shall be so considered.

I. FINDINGS OF FACT

A. Background

In May of 1993, Great Lakes was demobilizing a dredge project in the Boca Grande Channel off the west coast of Florida. Great Lakes orally hired Coastal to tow the dredge pipe and other equipment from Boca Grande to Green Cove on the east coast of Florida. Under the agreement, Coastal was to supply two tugs, the Captain Joe and the Miss Necie, plus crews. Great Lakes was to provide two assist tugs, the Cavalier State and the Volunteer State, to accompany Coastal's vessels to Green Cove. During the voyage, the Great Lakes' assist tugs would be responsible for helping Coastal's vessels maneuver the tows, provide an extra set of eyes to monitor the pipe rafts, and to assist in the event of unanticipated problems.

Coastal's lead tug, the Miss Necie, was towing two rafts made up of several five hundred foot dredge pipes. The Miss Necie was assisted by Great Lakes' assist tug, the Volunteer State. At all times during the trip, the Volunteer State was to receive its instructions from the Miss Necie. Coastal's second tug, the Captain Joe, was towing a derrick barge with a crane and other dredging equipment and one raft of 500 foot dredge pipe. The Captain Joe was assisted by Great Lakes' assist tug, the Cavalier State. At all times during the trip, the Cavalier State was to receive its instructions from the Captain Joe.

Great Lakes was responsible for the preparation of the pipe rafts and ensuring that the rafts were watertight, safe and seaworthy. Great Lakes used its own crane, welding equipment, and crews to prepare the tows. Great

Lakes, however, failed to test the pipes to confirm that they were airtight, despite being asked to do so by Coastal's operations manager.

On May 26, 1993, the Great Lakes-Coastal flotilla departed from Boca Grande en route to Green Cove. Great Lakes instructed Coastal to keep the derrick barge with the crane close to the Ms. Nessie [sic] pipe rafts in case something went wrong. Great Lakes, however, failed to send a welder or crane operator with the flotilla who could have made any required repairs.

Coastal initially contemplated that the tugs would take their tows south along the west coast of Florida to Key West, and then proceed up the east coast of Florida to Green Cove. One day out of Boca Grande, however, it was discovered that some of the pipes in the Miss Necie pipe raft were lower than normal in the water. The crew of the Volunteer State inspected the pipe raft and determined that the pipes were low, but that they had not sunk to the bottom.

A Great Lakes employee aboard the Volunteer State reported the sinking pipes to the lead captain of the Miss Necie. The captain of the Ms. Nessie [sic] then notified various officials at Great Lakes and Coastal about the sinking pipes and inquired as to the appropriate course of action. What followed were a series of conversations with officials at both companies, whereby no one in charge would render a decision. Officials at Coastal maintained that only Great Lakes could grant permission to stop the flotilla, while Great Lakes referred all questions back to Coastal officials.

Instead of providing Coastal crews any specific direction, Great Lakes arranged for a crane operator and welder to go to Marathon to meet up with the flotilla and fix Ms. Necie's tow. Having failed to attain permission from Great Lakes to stop the flotilla and out of concern for approaching bad weather, the Miss Necie elected to proceed through the Florida Keys National Marine Sanctuary ("Sanctuary") to Marathon where the Great Lakes repair crew would be waiting.

B. Seagrass Damage

1. Pipe Scar

At this point, the Miss Necie, Captain Joe, and their respective assist tugs all changed course to proceed through the Sanctuary. The Volunteer State, acting as an extra set of eyes for the Miss Necie, continued to report that the tow was holding together and that it could safely continue its course. As was later discovered, however, at least one pipe on the Miss Necie was so low that it dragged along the sea bottom as the flotilla entered the Sanctuary.

The dragging dredge pipe created a pipe scar approximately 13 miles long (the "Pipe Scar") and destroyed 18,280 square meters of sea bottom. The affected area consisted primarily of sea grasses and other sanctuary resources, including Thalassia (23%), Syringodium (76%), and small amounts of sand, sediment and algae (1%).[1]

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[1] In arriving at this figure, the Court relied almost entirely on the United States' estimates of the composition of the sea bottom prior to the creation of the Pipe Scar. The Court found

Both the government and Great Lakes have agreed that the Pipe Scar recovered on its own in three years and that no restoration at the site is necessary.

2. *Grounding Site*

While proceeding through the Sanctuary, the Miss Necie began to slow due to the dragging of the dredge pipe. The Captain Joe, following immediately behind the Miss Necie, failed to notice how much the Miss Necie had slowed until it was almost on top of her. Captain Trice, in charge of the Captain Joe at the time, ordered the Cavalier State (which was attached to the rear of the tow) to "back her down", i.e., to help slow the Captain Joe. Captain Trice then tried to pass the Miss Necie on the right. Realizing, however, that he would not be able to successfully execute that maneuver, Captain Trice brought the vessel back hard to the left. In executing the move to the left, he avoided a collision with the Miss Necie but momentarily ran aground on a bank in the Sanctuary.

Again, Captain Trice asked the Cavalier State to back up the Captain Joe and its tow. Captain Trice then swung the Captain Joe to the left or port side of the Miss Necie. As the Captain Joe came alongside of the Miss Necie this time, it ran hard aground. Captain Trice tried to get the Captain Joe off the bank to no avail. The Miss Necie, on the other hand, was able to continue forward and

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that the government's expert studies of the damaged areas were more thorough and precise than were Great Lakes'.

eventually brought itself to a stop outside of Marathon without further incident.

On the following morning, the Captain Joe was still hard aground. Some combination of the Captain Joe's own engines and the Cavalier State's pulling during failed attempts to extricate the tug had actually dragged the Captain Joe further along the bank. The local sanctuary authorities arrived on the scene later that afternoon to assess the situation. Working together with Coastal and Great Lakes, the authorities devised a plan to extricate the Captain Joe from the bank. Finally, at around 2:00 a.m. on the morning of May 27, during the highest tide, the Captain Joe was removed from the bank.

The grounding of the Captain Joe destroyed 7,495 square meters of the sea bottom and bank (the "Grounding Site"). The Grounding Site, prior to the incident, primarily consisted of Thalassia (69%), Syringodium (30%), and porites coral, sand and other sediment (1%).[2] Natural recolonization at the Grounding Site has been very slow, and a full recovery of the seagrasses at the Site is likely to take many years.

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[2] In arriving at this figure, the Court relied almost entirely on the United States' estimates of the composition of the sea bottom prior to the creation of the Grounding Site. *See* Hudson Report, Exhibit 18. The Court found that the government's expert studies of the damaged areas were more thorough and precise than were defendant's.

C. Seagrass Restoration

In accordance with federal regulations, the government has developed a plan to address injuries at the Grounding Site and Pipe Scar that involves two components – 1) primary restoration; and 2) compensatory restoration. *See* 60 Fed. Reg. 39804, *39805 (August 3, 1995) (codified at 15 C.F.R. Part 990). The primary restoration plan addresses restorative actions taken at the actual injury sites that attempt to return the injured resources back to their baseline condition *See id.* The compensatory restoration component addresses restorative or replacement actions at other sites within the Sanctuary to compensate for lost interim services of the destroyed resources.

1. Primary Restoration Proposal

The government's primary restoration plan seeks only to redress injuries at the Grounding Site since the parties and the Court agree that the Pipe Scar has recovered naturally and that no on-site restoration there is necessary. Although experts for both Great Lakes and the government are in accord that the Grounding Site has also begun to recover naturally, each disputes the extent of such recovery. The government maintains that the Grounding Site is highly unstable and will not recover to pre-grounding morphology for a number of years without on-site intervention.

As part of its primary restoration plan development, the government evaluated several restoration alternatives to address the injury at the Grounding Site. Of the several restoration plans it initially considered, the government

identified what it considered to be the three most viable alternatives, the 1) imported fill plan; 2) no action plan; and the 3) site regrading plan.[3] The government then selected the imported fill plan as its recommended alternative to restore the Grounding Site.

a. Imported Fill Plan

Under the imported fill plan, the government proposes filling the Grounding Site with imported limestone rock, sediment, and reinforcement boulders, in attempt to restore the site to pregrounding morphology and provide a stable substrate for vegetative recovery. In addition, the plan calls for the installation of more than thirty stainless steel stakes at the site that will assist the government in visually monitoring sediment movement within the area.

Implementation of the imported fill approach would require substantial construction and work activity over the Grounding Site, and any natural recovery of the site would likely be destroyed by filling the area. Nevertheless, the government maintains that the imported fill plan is the best alternative because it provides the greatest chance of returning the Grounding Site to its pregrounding morphology, stabilizing the area, and creating the

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[3] The Court does not address the site regrading alternative in detail because it is just a variation of the imported fill alternative. The concept behind it and the risks associated with it are similar. Like the imported fill option, regrading the site requires moving sediments into the Grounding Site trench area. Rather than using imported fill, however, the government would use sediments graded from the south berm area of the Grounding Site.

best potential for seagrass recruitment. The cost of physically restoring and monitoring the Grounding Site under the imported fill plan is approximately $894,690.00.[4]

b. No Action Plan

The second alternative the government considered in developing a primary restoration proposal is referred to as the no-action plan. Under the no-action plan, no action would be taken at the Grounding Site other than periodic monitoring to ensure that recovery continues. The injury would be left alone to adjust and evolve toward a natural equilibrium or stable condition over time. Any natural restoration or regrowth that has occurred would be left intact. Although the recovery period cannot be determined with precision, the evidence presented suggests that the Grounding Site would recover naturally in roughly seventy years. The government maintains that this is not the best alternative for primary restoration because it does not achieve the objective of restoring the site to its original condition.

2. *Compensatory Restoration Proposal*

As compensation for lost interim services provided by the resources destroyed at the Pipe Scar and Grounding Site, the government intends to implement compensatory restoration projects at other sites within the

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[4] Specifically, the government has asked for $480,257.00 for the actual physical restoration of the Grounding Site. In addition, the government asked for $308,041.00 for physical monitoring of the site and $106,392.00 for biological monitoring.

Sanctuary. In 1998, the government conducted a survey to identify potential seagrass restoration projects in the Sanctuary that would be similar in scale and nature to the 6.36 acres of seagrass destroyed at the Pipe Scar and Grounding Site.

The government determined that the most viable off-site compensatory restoration project would be to transplant seagrasses into boat-impacted areas that have subsequently been designated no-motor zones ("Prop Scar Restoration Project"). The Prop Scar Restoration Project contemplates restoring sea grasses into prop scars by introducing Halodule grass and bird stakes to initiate compressed succession of sea grass regrowth in the damaged areas. Compressed succession is a planting technique intended to achieve a more rapid rate of seagrass recovery by temporarily substituting faster growing Halodule grasses for the slower growing Thalassia. This sequence promotes suitable conditions for Thalassia to recolonize, in addition to stabilizing the sediment and establishing a functional seagrass habitat.

The government determined the appropriate scale of the Prop Scar Restoration Project using an assessment methodology known as the Habitat Equivalency Analysis ("HEA").[5] The HEA determines the quantity of the

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[5] The HEA is appropriate to determine the scale of compensatory restoration projects when 1) the primary category of lost on-site services pertains to the ecological/biological function of an area; 2) feasible restoration projects are available that provide services of the same type, quality, and comparable value to those that were lost; and 3) sufficient data on the required HEA input parameters exist and are cost effective to collect. *See Fisher*, 977 F. Supp. at 1198.

equivalent habitat necessary to be restored and/or created, so that total resource services gained through restoration equals total resource services lost due to the injury. *See Fisher*, 977 F. Supp. at 1198. The government concluded using the HEA that 2.19 acres of seagrass habitat must be restored under the Prop Scar Restoration Project to compensate for the interim loss of seagrass at the Pipe Scar and Grounding Site.

II. CONCLUSIONS OF LAW

A. Statutory Scheme

Remedies for damage to the Sanctuary are governed by the National Marine Sanctuaries Act ("NMSA") of 1972, as amended, 16 U.S.C. § 1431, *et seq.* Congress enacted the NMSA in response to "a growing concern about the increasing degradation of marine habitats." S.Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4387. The NMSA protects important and sensitive marine areas through the establishment of marine sanctuaries. *See Fisher*, 977 F. Supp. at 1199. The purpose of the sanctuaries is to preserve sensitive areas for conservation, recreational, aesthetic and ecological value.

B. Liability under the NMSA

The NMSA provides for strict liability to the United States for damage to any "sanctuary resource." *See, e.g., U.S. v. M/V Jacquelyn L.*, 100 F.3d 1520, 1521 (11th Cir. 1996); 16 U.S.C. § 1443(a)(1). The only available defense under the NMSA is that "the destruction or loss of, or injury to, the sanctuary resource was caused solely by an

act of God, an act of war, *or an act or omission of a third party*, and the person acted with due care." 16 U.S.C. § 1443(a)(3)(A) (emphasis added).

Accordingly, Great Lakes argues that under the NMSA, it is absolved of liability because it was Coastal's acts and/or omissions that actually caused the Pipe Scar and Grounding Site. This argument fails, however, under the reasoning set forth in *United States v. LeBoeuf Brothers Towing Co.*, 621 F.2d 787 (5th Cir. 1980).[6] In *LeBoeuf*, the Fifth Circuit, under a similar strict liability statute, rejected the argument that an independent contractor acting for and under the control of a defendant employer is a "third party" for the purpose of absolving the defendant employer of liability under the statute.

In *LeBoeuf*, the defendant employer hired an independent contractor tug crew to load and unload cargo at places and times designated by the defendant. *See id.* at 788. The independent tug crew accidentally discharged oil into the Mississippi River, and the United States brought suit against the defendant employer under the Federal Water Pollution Control Act ("FWPCA") to recover the costs of cleaning up the oil spill. *See id.* The FWPCA, in language strikingly similar to the NMSA, provides that the owner or operator of a discharging vessel is strictly liable to the government for the costs of cleaning up spills unless the discharge was caused solely by an act of God, an act of war, or *an act or omission of a*

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[6] The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

third party. *See id*. Under this provision, the defendant employer argued that it was not liable because it was the acts or omissions of the third party independent tug crew that caused the spill.

The Court rejected the defendant's argument and held that an employer of an independent contractor cannot avoid strict liability under the FWPCA for an oil spill caused by the contractor because the employer "held ultimate control over [the contractor] by hiring it in the first place, specifying its itinerary, and retaining it throughout the job." *See id*. at 790. The court reasoned that the third-party defense was not intended to protect a party from the acts or omissions of those acting under its control or on its behalf. *See id*.

In reaching this conclusion, the Fifth Circuit relied, in part, on the fact that the FWPCA is a remedial statute that should be interpreted in a way such that liability can be easily imposed for environmental damage.[7] *See id* at 789. The court reasoned that the statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners could escape strict liability merely by hiring out their operations to independent contractors. *See id*. Furthermore, the court concluded that a broad interpretation of the third party defense would be entirely inconsistent with the statute's other defenses that include only very narrow exceptions, such as acts of God, acts of war, and instances in which the

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[7] This rationale was later ratified by another Fifth Circuit opinion, which the Supreme Court declined to review. *See United States v. Hollywood Marine*, 625 F.2d 524 (5th Cir. 1980), *cert. denied* 451 U.S. 994 (1981).

government's own negligence is the sole cause of a spill. *See id.*

This Court finds that the NMSA, like the FWPCA, is a remedial statute that should be interpreted in a way that will effectuate its remedial purposes. The FWPCA and NMSA have very similar provisions for remedial action and limited categories of defenses that were intended to provide a straightforward means to impose liability for environmental damage. Therefore, the narrow interpretation of the third party defense set forth in *LeBoeuf* applies equally in actions under the NMSA, and Great Lakes cannot rely on the defense to avoid liability.[8] Precluding Great Lakes from asserting the defense for the actions of those acting on its behalf and under its control "promotes the goals of the statute and of traditional tort policy because it will encourage [owner-operators] to select [independent contractors] carefully and to insure against potential losses." *See id.*

Accordingly, Great Lakes is strictly liable under the NMSA for damage to the Sanctuary, whether caused by itself or Coastal, because Great Lakes "held ultimate control over [Coastal] by hiring it in the first place, specifying its itinerary, and retaining it throughout the job."

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[8] Although there is some limited meaningful argument from the parties as to Coastal's status, it is clear from the facts, and by comparison to the facts in *LeBoeuf*, that Coastal was an independent contractor.

C. Damages

Title 16 U.S.C. § 1432(6) and related case law set forth the parameters for compensation for injury to Sanctuary resources. *See, e.g., United States v. Fisher,* 22 F.3d 262 (11th Cir. 1994); *Fisher,* 977 F.Supp at 1201. Under the NMSA, the government is entitled to compensation for implementation of both its primary restoration plan and its compensatory restoration plan approved by the Court. *See id.*

1. Primary Restoration

Under the primary restoration component of damages, the government is entitled to recover the cost of implementing its plan that restores or replaces the injured resource, or the cost of acquiring the equivalent of the sanctuary resource if it cannot be restored or replaced. *See* 16 U.S.C. § 1432(6)(A); *Fisher,* 977 F. Supp. at 1201. In determining whether the government's proposed primary restoration plan is feasible and whether its costs are justified, a court must "make a complete examination of both the environmental factors involved and the practicalities of the situation." *See United States v. Joseph Moretti, Inc.,* 526 F.2d 1306, 1310 (5th Cir. 1976)

It is inherently difficult for courts to measure the full effect and impact of any environmental disturbance. Attempts to reverse the effects of a disturbance or injury and to restore the environment to its natural state carry no guarantee of success. *See United States v. Sexton Cove Estates, Inc.* 526 F.2d 1293 (5th Cir. 1976). A court must consider the cost of the plan in relation to its prospects for success. *See United States v. M.C.C. of Florida, Inc.,* 772

F.2d 1501 (11th Cir. 1985). A court should not order a restoration plan when its contemplated results prove too speculative and its implementation too costly. *See id.* Any restoration plan must be carefully designed to confer maximum environmental benefits. At the same time, however, the law should be tempered with a touch of equity. *See Sexton Cove,* 526 F.2d at 1301. A defendant should not be assessed damages for a restorative program when the site is naturally recovering on its own, or the impracticality of implementing a restorative program and the unlikelihood of the program's success warrant against it.

The Court has carefully considered the government's recommended restoration plan, its costs, and its benefits. For the reasons set forth below, the Court rejects the government's determination that the imported fill plan is the best alternative for primary restoration of the Grounding Site. Rather, the Court concludes that the no-action plan evaluated by the government provides a more suitable alternative for primary restoration of the site.[9]

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[9] Courts have considerable latitude in determining the appropriate remedy in environmental damage cases, and the Court is not bound by the government's recommendation as to the best plan for restoration. *See United States v. Board of Trustees of Florida Keys Community College,* 531 F. Supp. 267, 275 (S.D. Fla. 1981) (determining that development of an alternative remedial plan was preferable to the government's plan for total restoration). Although a court cannot order a remedy or compensation for environmental injury without a specific plan for restoration having been suggested or submitted before it, there is a specific plan before the court in the instant case. *See United States v. M.C.C. of Florida, Inc.,* 772 F.2d 1501, 1507 (11th Cir. 1985) (court may not award damages without a specific

The government's proposed plan to use imported sediment to fill and restore the Grounding Site contemplates results too speculative to justify its significant fiscal and ecological costs. First, the Court is not persuaded that placing sediment and stabilization boulders at the Grounding Site will restore the bank to its original morphology (even if this could be precisely determined). Although the government maintains that restoring the site to its original morphology is the primary benefit of the imported fill plan, its own experts have concluded that no restoration plan will ever restore the Grounding Site to pre-injury condition. The morphological signature of the injury will be visible for many years to come irrespective of what plan is implemented.[10]

Furthermore, by almost all government expert accounts, the Grounding Site is expected to fully recover on its own within roughly seventy years.[11] The government has failed to present any convincing evidence that the imported fill plan will significantly reduce this natural recovery period. Nor is there concrete evidence that the restoration plan will promote longer-term stabilization at the Grounding Site or better recruitment of seagrasses than natural recovery would provide. In fact, evidence suggests that in-filling the Grounding Site trench will destroy all natural recovery that has occurred

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restoration plan before it). The Court is adopting the no-action plan that the government has already evaluated and determined to be a viable option for primary restoration.

[10] *See* Bodge Report, Exhibit 97.

[11] *See* Hudson Report, Exhibit 18; Zieman Report, Exhibit 79; Kenworthy Report, Exhibits 49, 51, 58, 60.

up to this point and cause harm to previously undamaged biota.[12]

It also appears from the government's expert reports that the proposed restoration project entails a considerable risk of further disrupting or damaging the site. Filling the site with imported rocks and reinforcement boulders would require extensive construction and personnel directly over the site.[13] The necessary use of barges, tugs, and other large machinery during the restoration project raises the potential for further impacts in the swift, shallow waters surrounding the Grounding Site.[14]

The Court is also concerned that filling the Grounding Site with rocks, boulders, and steel rods may create additional navigational and environmental hazards in the shallow waters of the Sanctuary. Evidence presented at this trial demonstrated that boats strike bottom and run aground in the waters off Florida's coast on an alarmingly regular basis. Generally, such a groundings have not resulted in hull breaches or pollution spills. However, placing boulders and steel rods in the already shallow Sanctuary waters may increase the potential for significant hull damage and pollution leaks should another vessel strike the site in the future. Given the regularity of groundings in this area, further collisions are not an altogether unlikely scenario.

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[12] *See* Bodge Report, Exhibit 97.

[13] *See* Environmental Development Report, Exhibit 70.

[14] *See id.*, Bodge Report, Exhibit 97 (invasive action requiring large volumes of material and/or large vessels would significantly increase risk of additional damage to site).

For all of the foregoing reasons, the Court will not approve the government's imported fill plan for primary restoration of the Grounding Site. Instead, the Court concludes that the no-action plan evaluated by the government is the best plan for primary restoration. The no-action plan is non-intrusive and requires no one-site construction. Thus, the potential for further grounding associated with construction equipment and vessels is avoided. Furthermore, several years have passed since the grounding incident, and considerable natural recovery has occurred up to this point. The no-action plan will allow existing regrowth and unaffected areas to remain intact. The Court believes that it would be counterproductive at this date to in-fill the trench and destroy all natural regrowth, as well as risking adversely impacting previously undisturbed adjacent areas. Nevertheless, because full recovery cannot be assured at this point, the government shall continue surveying and monitoring the site under the no-action plan to establish baseline data and assess potential instabilities.

The Court concedes that this is not an entirely satisfactory result. Great Lakes is responsible for significant environmental damage and should be required to pay the price for its actions. Nevertheless, the government has failed to demonstrate to the Court that the speculative results contemplated by in-filling the Grounding Site trench are worth engaging in extensive construction at the already ecologically sensitive site and destroying years of natural regrowth. This court will not order a primary restoration plan at significant fiscal and ecological cost without some measure to ensure the plan will work and not cause greater environmental damage. In the

struggle to repair damage already done, the Court is wary of doing greater harm.

2. *Compensatory Restoration*

In addition to recovering primary restoration compensation for restoring or replacing the injured resources, the government is also entitled to compensation for the interim lost use of the resources at the Pipe Scar and Grounding Site during the period from destruction to recovery. *See* 16 U.S.C. § 1432(6)(A); *Fisher*, 977 F. Supp. at 1201. Recovery for lost interim services will be in the form of seagrass restoration projects at other suitable locations within the Sanctuary. The Court concludes that the Prop Scar Restoration Program developed by the government is an appropriate compensatory restoration project and will provide seagrass services equivalent to those lost due to the injuries caused by Great Lakes at the Grounding Site and Pipe Scar.

The United States' reliance on the Habitat Equivalency Analysis ("HEA") to scale the appropriate compensatory seagrass restoration projects for both the Pipe Scar and the Grounding Site was appropriate, including the use of a 3% discount rate to calculate damages. The Court concludes, however, that the government's HEA calculation for the Grounding Site is incorrect only to the extent that it fails to reflect its own experts' conclusions with respect to the composition of the sea bottom. The HEA input parameters used by the government assume that the entire area consisted only of Thalassia, rather than the combination of Thalassia (69%), Syringodium (30%), and other sanctuary resources (1%) that is reflected in the

government's expert report accepted as correct by this Court.[15] The failure to include the appropriate ratios of Syringodium in the parameters artificially inflated the value of the HEA. Accordingly, the HEA figure must be recalculated using the appropriate Thalassia/Syringodium ratio as described by the Court above and in the Hudson Report.

To the extent that it is changed by the newly-figured HEA, the government's $357,556.00 damage estimation must be recalculated using the same criteria and formula that the government applied in its original damage determination. When recalculating this figure, the Court does not intend that the parties review new evidence or revisit the government's methodology or process by which it arrived at its compensatory restoration cost estimation. Rather, the Court envisions that the parties will engage in a purely mathematical recalculation of compensatory restoration costs taking into account the corrected HEA value.

3. *Response and Assessment Costs*

The United States is also entitled to recover its response and damage assessment costs and interest pursuant to 16 U.S.C. § 1432(6)(C) & (7). Damage assessment costs, however, do not properly include attorney's fees. *See Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 779 (D.C. Cir. 1997). The government's proposed $343,622.00 response and damage assessment estimation

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[15] *See* Hudson Report, Exhibit 18.

is correct in all respects, except to the extent that it includes attorney's fees.

The Court is unable to ascertain what portion of the government's $343,622.00 figure is attributable to attorney's fees. From the evidence already presented before this Court, the government shall determine the amount of attorney's fees it included in the $343,622.00 response and damage assessment figure and deduct that amount. In addition, the government must recalculate the interest on the new response and damage assessment calculation after attorney's fees have been subtracted.

CONCLUSION

Accordingly, upon due consideration of the evidence, the arguments of counsel and the record, it is

ORDERED AND ADJUDGED that:

1. Judgment is entered in favor of the United States against Great Lakes for the damage caused at the Pipe Scar and Grounding Site;

2. The government's claim for $480,257.00 to implement its recommended primary restoration plan at the Grounding Site is DENIED.

3. The government is entitled to compensation for the cost of physical and biological monitoring of the Grounding Site. From the evidence already presented before the Court, the government shall recalculate its proposed physical and biological monitoring costs to reflect the Court's cónclusion that the no-action alternative is the appropriate plan for primary restoration.

4. The government is entitled to recover its response and assessment costs. The government must recalculate its response and assessment cost estimation to reflect the Court's conclusion that attorney's fees are not awardable.

5. The government is entitled to recover its compensatory restoration and monitoring costs. The government shall provide the Court with a revised statement of the compensatory restoration and monitoring costs after it recalculates the HEA for the Grounding Site to include the proper ratios of Syringodium and Thalassia.

6. The government may also recover its NEPA and NOAA permitting and supervision costs. The Court is unable to determine from the record what portion of the estimated costs relate to the government's proposed on-site physical restoration activities that this Court has rejected. From the evidence already presented before this Court, the government shall recalculate its NEPA and NOAA cost estimation figures and exclude any amount attributable to on-site construction at the Grounding Site.

7. In accordance with the government's agreement on the issue, the total damages assessed against Great Lakes shall be offset by $618,484.86, the amount of the government's settlement with Coastal.

8. The United States shall have until twenty days from the date of entry of this order to provide the Court with the recalculated HEA and cost statements. Great Lakes' rebuttal to the same is due no later than ten days from the date the government resubmits its recalculated HEA and cost statements.

FURTHER ORDERED AND ADJUDGED that all pending motions are DENIED as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of Sept., 1999.

/s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

copies furnished:
Magistrate Judge Brown

Robert Birthisel
John M. Woods
Allan R. Kelley
Jon Mueller
Maureen Donlan
Maureen Malvern

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12002-CE

UNITED STATES OF AMERICA,

Plaintiff-Appellee-
Cross-Appellant,

INTERNAL IMPROVEMENT TRUST FUND, BOARD OF TRUSTEES, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiffs-Appellees,

versus

GREAT LAKES DREDGE & DOCK COMPANY,

Defendant-Appellant-
Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Nov. 05, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

BEFORE: ANDERSON, Chief Judge, RONEY and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

16 U.S.C. § 1432. Definitions

As used in this chapter, the term –

(1) "draft management plan" means the plan described in section 1434(a)(1)(C)(v) of this title;

(2) "Magnuson-Stevens Act" means the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.);

(3) "marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law;

(4) "Secretary" means the Secretary of Commerce;

(5) "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States;

(6) "damages" includes –

(A) compensation for –

(i)(I) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource; and

(II) the value of the lost use of a sanctuary resource pending its restoration or replacement or the acquisition of an equivalent sanctuary resource; or

(ii) the value of a sanctuary resource if the sanctuary resource cannot be restored or replaced or if the equivalent of such resource cannot be acquired;

(B) the cost of damage assessments under section 312(b)(2);

(C) the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources;

(D) the cost of curation and conservation of archeological, historical, and cultural sanctuary resources; and

(E) the cost of enforcement actions undertaken by the Secretary in response to the destruction or loss of, or injury to, a sanctuary resource;

(7) "response costs" means the costs of actions taken or authorized by the Secretary to minimize destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risks of such destruction, loss, or injury, including costs related to seizure, forfeiture, storage, or disposal arising from liability under section 1443 of this title;

(8) "sanctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary;

(9) "exclusive economic zone" means the exclusive economic zone as defined in the Magnuson-Stevens Act [16 U.S.C.A. § 1801 et seq.]; and

(10) "System" means the National Marine Sanctuary System established by section 1431 of this title.

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16 U.S.C. § 1433. Sanctuary designation standards

(a) Standards

The Secretary may designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary determines that –

(1) the designation will fulfill the purposes and policies of this title;

(2) the area is of special national significance due to –

(A) its conservation, recreational, ecological, historical, scientific, cultural, archaeological, [sic] educational, or esthetic qualities;

(B) the communities of living marine resources it harbors; or

(C) its resource or human-use values;

(3) existing State and Federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(4) designation of the area as a national marine sanctuary will facilitate the objectives stated in paragraph (3); and

(5) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.

(b) Factors and consultations required in making determinations and findings

(1) Factors

For purposes of determining if an area of the marine environment meets the standards set forth in subsection (a) of this section, the Secretary shall consider –

(A) the area's natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, maintenance of critical habitat of endangered species, and the biogeographic representation of the site;

(B) the area's historical, cultural, archaeological, [sic] or paleontological significance;

(C) the present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(D) the present and potential activities that may adversely affect the factors identified in subparagraphs (A), (B), and (C);

(E) the existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of this chapter;

(F) the manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(G) the public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(H) the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development;

(I) the socioeconomic effects of sanctuary designation;

(J) the area's scientific value and value for monitoring the resources and natural processes that occur there;

(K) the feasibility, where appropriate, of employing innovative management approaches to protect sanctuary resources or to manage compatible uses; and

(L) the value of the area as an addition to the System.

(2) Consultation

In making determinations and findings, the Secretary shall consult with –

(A) the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate;

(B) the Secretaries of State, Defense, Transportation, and the Interior, the Administrator, and the heads of other interested Federal agencies;

(C) the responsible officials or relevant agency heads of the appropriate State and local government entities, including coastal zone management agencies, that will or are likely to be affected by the establishment of the area as a national marine sanctuary;

(D) the appropriate officials of any Regional Fishery Management Council established by section 1852 of this title that may be affected by the proposed designation; and

(E) other interested persons.

(3) Repealed, Pub.L. 106-513, § 5(b)(2), Nov. 13, 2000, 114 Stat. 2383.

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16 U.S.C. § 1443. Destruction or loss of, or injury to, sanctuary resources

(a) Liability

(1) Liability to United States

Any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for an amount equal to the sum of –

(A) the amount of response costs and damages resulting from the destruction, loss, or injury; and

(B) interest on that amount calculated in the manner described under section 2705 of Title 33.

(2) Liability in rem

Any vessel used to destroy, cause the loss of, or injure any sanctuary resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury. The amount of that liability shall constitute a maritime lien on the vessel and may be recovered in an action in rem in any district court of the United States that has jurisdiction over the vessel.

(3) Defenses

A person is not liable under this subsection if that person establishes that –

(A) the destruction or loss of, or injury to, the sanctuary resource was caused solely by an act of God, an act of war, or an act or omission of a third party, and the person acted with due care;

(B) the destruction, loss, or injury was caused by an activity authorized by Federal or State law; or

(C) the destruction, loss, or injury was negligible.

(4) Limits to liability

Nothing in sections 175, 181 to 183, and 183b to 188 of the Appendix to Title 46 or section 192 of the Appendix to Title 46 shall limit the liability of any person under this chapter.

(b) Response actions and damage assessment

(1) Response actions

The Secretary may undertake or authorize all necessary actions to prevent or minimize the destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risk of such destruction, loss, or injury.

(2) Damage assessment

The Secretary shall assess damages to sanctuary resources in accordance with section 1432(6) of this title.

(c) Civil actions for response costs and damages

(1) Commencement

The Attorney General, upon request of the Secretary, may commence a civil action against any person or vessel who may be liable under subsection (a) for response costs and damages. The Secretary, acting as trustee for sanctuary resources for the United States, shall submit a request for such an action to the Attorney General whenever a person may be liable for such costs or damages.

(2) Venue

An action under this subsection may be brought in the United States district court for any district in which –

(A) the defendant is located, resides, or is doing business, in the case of an action against a person;

(B) the vessel is located, in the case of an action against a vessel; or

(C) the destruction of, loss of, or injury to a sanctuary resource occurred.

(d) Use of recovered amounts

Response costs and damages recovered by the Secretary under this section shall be retained by the Secretary in the manner provided for in section 9607(f)(1) of Title 42 and used as follows:

(1) Response costs

Amounts recovered by the United States for costs of response actions and damage assessments under this section shall be used, as the Secretary considers appropriate –

(A) to reimburse the Secretary or any other Federal or State agency that conducted those activities; and

(B) after reimbursement of such costs, to restore, replace, or acquire the equivalent of any sanctuary resource.

(2) Other amounts

All other amounts recovered shall be used, in order of priority –

(A) to restore, replace, or acquire the equivalent of the sanctuary resources that were the subject of the action, including for costs of monitoring and the costs of curation and conservation of archeological, historical, and cultural sanctuary resources;

(B) to restore degraded sanctuary resources of the national marine sanctuary that was the subject of the action, giving priority to sanctuary resources and habitats that are comparable to the sanctuary resources that were the subject of the action; and

(C) to restore degraded sanctuary resources of other national marine sanctuaries.

(3) Federal-State coordination

Amounts recovered under this section with respect to sanctuary resources lying within the jurisdiction of a State shall be used under paragraphs (2)(A) and (B) in accordance with the court decree or settlement agreement and an agreement entered into by the Secretary and the Governor of that State.

(e) Statute of limitations

An action for response costs or damages under subsection (c) shall be barred unless the complaint is filed within 3 years after the date on which the Secretary completes a damage assessment and restoration plan for the sanctuary resources to which the action relates.

PL 101-605 (HR 5909)
November 16, 1990
FLORIDA KEYS NATIONAL MARINE
SANCTUARY AND PROTECTION ACT

An Act to establish the Florida Keys National Marine Sanctuary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SHORT TITLE

SECTION 1. This Act may be cited as the "Florida Keys National Marine Sanctuary and Protection Act".

FINDINGS

SEC. 2. The Congress finds and declares the following:

Sec. 2(1)

(1) The Florida Keys extend approximately 220 miles southwest from the southern tip of the Florida peninsula.

Sec. 2(2)

(2) Adjacent to the Florida Keys land mass are located spectacular, unique, and nationally significant marine environments, including seagrass meadows, mangrove islands, and extensive living coral reefs.

Sec. 2(3)

(3) These marine environments support rich biological communities possessing extensive conservation, recreational, commercial, ecological, historical, research educational, and esthetic values which give this area special national significance.

Sec. 2(4)

(4) These environments are the marine equivalent of tropical rain forests in that they support high levels of biological diversity, are fragile and easily susceptible to damage from human activities, and possess high value to human beings if properly conserved.

Sec. 2(5)

(5) These marine environments are subject to damage and loss of their ecological integrity from a variety of sources of disturbance.

Sec. 2(6)

(6) Vessel groundings along the reefs of the Florida Keys represent one of many serious threats to the continued vitality of the marine environments of the Florida Keys which must be addressed in order to protect their values.

Sec. 2(7)

(7) Action is necessary to provide comprehensive protection for these marine environments by establishing a Florida Keys National Marine Sanctuary, by restricting vessel traffic within such Sanctuary, and by requiring promulgation of the management plan and regulations to protect Sanctuary resources.

Sec. 2(8)

(8) The agencies of the United States must cooperate fully to achieve the necessary protection of Sanctuary resources.

Sec. 2(9)

(9) The Federal Government and the State of Florida should jointly develop and implement a comprehensive program to reduce pollution in the waters offshore the Florida Keys to protect and restore the water quality, coral reefs, and other living marine resources of the Florida Keys environment.

POLICY AND PURPOSE

SEC. 3. (a) POLICY – It is the policy of the United States to protect and preserve living and other resources of the Florida Keys marine environment.

Sec. 3(b)

(b) PURPOSE – The purpose of this Act is to protect the resources of the area described in section 5(b), to educate and interpret for the public regarding the Florida Keys marine environment, and to manage such human uses of the Sanctuary consistent with this Act. Nothing in this Act is intended to restrict activities that do not cause an adverse effect to the resources or property of the Sanctuary or that do not pose harm to users of the Sanctuary.

DEFINITION

SEC. 4. As used in this Act, the term "adverse effect" means any factor, force, or action that would independently or cumulatively damage, diminish, degrade, impair, destroy, or otherwise harm –

Sec. 4(1)

(1) any Sanctuary resource, as defined in section 302(8) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432 (8)); or

Sec. 4(2)

(2) any of those qualities, values, or purposes for which the Sanctuary is designated.

SANCTUARY DESIGNATION

SEC. 5. (a) DESIGNATION. – The area described in subsection (b) is designated as the Florida Keys National Marine Sanctuary (in this Act referred to as the "Sanctuary") under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.). The Sanctuary shall be managed and regulations enforced under all applicable provisions of such title III as if the Sanctuary had been designated under such title.

Sec. 5(b)

(b) AREA INCLUDED. – (1) Subject to subsections (c) and (d), the area referred to in subsection (a) consists of all submerged lands and waters, including living marine and other resources within and on those lands

and waters, from the mean high water mark to the boundary described under paragraph (2), with the exception of areas within the Fort Jefferson National Monument. The Sanctuary shall be generally identified and depicted on National Oceanic and Atmospheric Administration charts FKNMS 1 and 2, which shall be maintained on file and kept available for public examination during regular business hours at the Office of Ocean and Coastal Resource Management of the National Oceanic and Atmospheric Administration and which shall be updated to reflect boundary modifications under this section.

(2) The boundary referred to in paragraph (1) –

(A) begins at the northeasternmost point of Biscayne National Park located at approximately 25 degrees 39 minutes north latitude, 80 degrees 5 minutes west longitude, then runs eastward to the 300-foot isobath located at approximately 25 degrees 39 minutes north latitude, 80 degrees 4 minutes west longitude;

(B) then runs southward and connects in succession the points at the following coordinates:

(i) 25 degrees 34 minutes north latitude, 80 degrees 4 minutes west longitude,

(ii) 25 degrees 28 minutes north latitude, 80 degrees 5 minutes west longitude, and

(iii) 25 degrees 21 minutes north latitude, 80 degrees 7 minutes west longitude;

(C) then runs southward to the northeastern corner of the existing Key Largo National Marine Sanctuary located at 25 degrees 16 minutes north latitude, 80 degrees 8 minutes west longitude;

Sec. 5(b)

(D) then runs southwesterly approximating the 300-foot isobath and connects in succession the points at the following coordinates:

(i) 25 degrees 7 minutes north latitude, 80 degrees 13 minutes west longitude,

(ii) 24 degrees 57 minutes north latitude, 80 degrees 21 minutes west longitude,

(iii) 24 degrees 39 minutes north latitude, 80 degrees 52 minutes west longitude,

(iv) 24 degrees 30 minutes north latitude, 81 degrees 23 minutes west longitude,

(v) 24 degrees 25 minutes north latitude, 81 degrees 50 minutes west longitude,

(vi) 24 degrees 22 minutes north latitude, 82 degrees 48 minutes west longitude,

(vii) 24 degrees 37 minutes north latitude, 83 degrees 6 minutes west longitude,

(viii) 24 degrees 40 minutes north latitude, 83 degrees 6 minutes west longitude,

(ix) 24 degrees 46 minutes north latitude, 82 degrees 54 minutes west longitude,

(x) 24 degrees 44 minutes north latitude, 81 degrees 55 minutes west longitude,

(xi) 24 degrees 51 minutes north latitude, 81 degrees 26 minutes west longitude, and

(xii) 24 degrees 55 minutes north latitude, 80 degrees 56 minutes west longitude;

(E) then follows the boundary of Everglades National Park in a southerly then northeasterly direction through Florida Bay, Buttonwood Sound, Tarpon Basin, and Blackwater Sound;

(F) after Division Point, then departs from the boundary of Everglades National Park and follows the western shoreline of Manatee Bay, Barnes Sound, and Card Sound;

(G) then follows the southern boundary of Biscayne National Park and the northern boundary of Key Largo National Marine Sanctuary to the southeasternmost point of Biscayne National Park; and

(H) then follows the eastern boundary of the Biscayne National Park to the beginning point specified in subparagraph (A).

Sec. 5(c)

(c) AREAS WITHIN STATE OF FLORIDA. – The designation under subsection (a) shall not take effect for any area located within the waters of the State of Florida if, not later than 45 days after the date of enactment of this Act, the Governor of the State of Florida objects in writing to the Secretary of Commerce.

Sec. 5(d)

(d) BOUNDARY MODIFICATIONS. – No later than the issuance of the draft environmental impact statement for the Sanctuary under section 304(a)(1)(C)(vii) of the Marine Protection, Research, and Sanctuaries Act of 1972

(16 U.S.C. 1434(a)(1)(C)(vii)), in consultation with the Governor of the State of Florida, if appropriate, the Secretary of Commerce may make minor modifications to the boundaries of the Sanctuary as necessary to properly protect Sanctuary resources. The Secretary of Commerce shall submit to the committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a written notification of such modifications. Any boundary modification made under this subsection shall be reflected on the charts referred to in subsection (b)(1).

PROHIBITION OF CERTAIN USES

SEC. 6. (a) VESSEL TRAFFIC. – (1) Consistent with generally recognized principles of international law, a person may not operate a tank vessel (as that term is defined in section 2101 of title 46, United States Code) or a vessel greater than 50 meters in length in the Area To Be Avoided described in the Federal Register notice of May 9, 1990 (55 Fed. Reg. 19418-19419).

(2) The prohibition in paragraph (1) shall not apply to necessary operations of public vessels. For the purposes of this paragraph, necessary operations of public vessels shall include operations essential for national defense, law enforcement, and responses to emergencies that threaten life, property, or the environment.

(3) The provisions of paragraphs (1) and (2), including the area in which vessel operations are prohibited under paragraph (1), may be modified by regulations

issued jointly by the Secretary of the department in which the Coast Guard is operating and the Secretary of Commerce.

(4) This subsection shall be effective on the earliest of the following:

(A) The date that is six months after the date of enactment of this Act,

(B) the date of publication of a notice to mariners consistent with this section, or

(C) the date of publication of new nautical charts consistent with this section.

Sec. 6(b)

(b) MINERAL AND HYDROCARBON LEASING, EXPLORATION, DEVELOPMENT, AND PRODUCTION. – No leasing, exploration, development, or production of minerals or hydrocarbons shall be permitted within the Sanctuary.

COMPREHESIVE MANAGEMENT PLAN

SEC. 7. (a) PREPARATION OF PLAN. – The Secretary of Commerce, in consultation with appropriate Federal, State, and local government authorities and with the Advisory Council established under section 208, shall develop a comprehensive management plan and implementing regulations to achieve the policy and purpose of this Act. The Secretary of Commerce shall complete such comprehensive management plan and final regulations

for the Sanctuary not later than 30 months after the date of enactment of this Act. In developing the plan and regulations, the Secretary of Commerce shall follow the procedures specified in sections 303 and 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1433 and 1434), except those procedures requiring the delineation of Sanctuary boundaries and development of a resource assessment report. Such comprehensive management plan shall –

(1) facilitate all public and private uses of the Sanctuary consistent with the primary objective of Sanctuary resource protection;

(2) consider temporal and geographical zoning, to ensure protection of Sanctuary resources;

(3) incorporate regulations necessary to enforce the elements of the comprehensive water quality protection program developed under section 8 unless the Secretary of Commerce determines that such program does not meet the purpose for which the Sanctuary is designated or is otherwise inconsistent or incompatible with the comprehensive management plan developed under this section;

(4) identify needs for research and establish a long-term ecological monitoring program;

(5) identify alternative sources of funding needed to fully implement the plan's provisions and supplement appropriations under section 9 of this Act and section 313 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1444).

(6) ensure coordination and cooperation between Sanctuary managers and other Federal, State, and local authorities with jurisdiction within or adjacent to the Sanctuary;

(7) promote education, among users of the Sanctuary, about coral reef conservation and navigational safety; and

(8) incorporate the existing Looe Key and Key Largo National Marine Sanctuaries into the Florida Keys National Marine Sanctuary except the Looe Key and Key Largo Sanctuaries shall continue to be operated until completion of the comprehensive management plan for the Florida Keys Sanctuary.

Sec. 7(b)

(b) PUBLIC PARTICIPATION. – The Secretary of Commerce shall provide for participation by the general public in development of the comprehensive management plan.

Sec. 7(c)

(c) TERMINATION OF STUDIES. – On the date of enactment of this Act, all congressionally mandated studies of existing areas of the Florida Keys for designation as National Marine Sanctuaries shall be terminated.

FLORIDA KEYS WATER QUALITY

SEC. 8. (a) WATER QUALITY PROTECTION PROGRAM. – (1) Not later than 18 months after the date of

enactment of this Act, the Administrator of the Environmental Protection Agency and the Governor of the State of Florida, in consultation with the Secretary of Commerce, shall develop a comprehensive water quality protection program for the Sanctuary. If the Secretary of Commerce determines that such comprehensive water quality protection program does not meet the purpose for which the Sanctuary is designated or is otherwise inconsistent or incompatible with the comprehensive management plan prepared under section 7, such water quality program shall not be included in the comprehensive management plan. The purpose of such water quality program shall be to –

(A) recommend priority corrective actions and compliance schedules addressing point and nonpoint sources of pollution to restore and maintain the chemical, physical, and biological integrity of the Sanctuary, including restoration and maintenance of a balanced, indigenous population of corals, shellfish, fish and wildlife, and recreational activities in and on the water; and

(B) assign responsibilities for the implementation of the program among the Governor, the Secretary of Commerce, and the Administrator in accordance with applicable Federal and State laws.

(2) The program required by paragraph (1) shall, under applicable Federal and State laws, provide for measures to achieve the purposes described under paragraph (1), including –

(A) adoption or revision, under applicable Federal and State laws, by the State and the Administrator of applicable water quality standards for the Sanctuary,

based on water quality criteria which may utilize biological monitoring or assessment methods, to assure protection and restoration of the water quality, coral reefs, and other living marine resources of the Sanctuary;

(B) adoption under applicable Federal and State laws of enforceable pollution control measures (including water quality/based effluent limitations and best management practices) and methods to eliminate or reduce pollution from point and nonpoint sources;

(C) establishment of a comprehensive water quality monitoring program to (i) determine the sources of pollution causing or contributing to existing or anticipated pollution problems in the Sanctuary, (ii) evaluate the effectiveness of efforts to reduce or eliminate those sources of pollution, and (iii) evaluate progress toward achieving and maintaining water quality standards and toward protecting and restoring the coral reefs and other living marine resources of the Sanctuary;

(D) provision of adequate opportunity for public participation in all aspects of developing and implementing the program; and

(E) identification of funding for implementation of the program, including appropriate Federal and State cost sharing arrangements.

Sec. 8(b)

(b) COMPLIANCE AND ENFORCEMENT. – The Administrator of the Environmental Protection Agency, the Secretary of Commerce, and the Governor of the State of Florida shall ensure compliance with the program

required by this section, consistent with applicable Federal and State laws.

Sec. 8(c)

(c) CONSULTATION. – In the development and implementation of the program required by paragraph (1), appropriate State and local government officials shall be consulted.

ADVISORY COUNCIL

SEC. 9. (a) ESTABLISHMENT. – The Secretary of Commerce, in consultation with the Governor of the State of Florida and the Board of County Commissioners of Monroe County, Florida, shall establish an Advisory Council to assist the Secretary in the development and implementation of the comprehensive management plan for the Sanctuary.

Sec. 9(b)

(b) MEMBERSHIP. – Members of the Advisory Council may be appointed from among (1) Sanctuary managers, (2) members of other government agencies with overlapping management responsibilities for the Florida Keys marine environment, and (3) representatives of local industries, commercial users, conservation groups, the marine scientific and educational community, recreational user groups, or the general public.

Sec. 9(c)

(c) EXPENSES. – Members of the Advisory Council shall not be paid compensation for their service as members and shall not be reimbursed for actual and necessary traveling and subsistence expenses incurred by them in the performance of their duties as such members.

Sec. 9(d)

(d) ADMINISTRATION. – The Advisory Council shall elect a chairperson and may establish subcommittees, and adopt by laws, rules, and such other administrative requirements and procedures as are necessary for the administration of its functions.

Sec. 9(e)

(e) STAFFING AND OTHER ASSISTANCE. – The Secretary of Commerce shall make available to the Advisory Council such staff, information, and administrative services and assistance as the Secretary of Commerce determines are reasonably required to enable the Advisory Council to carry out its functions.

AUTHORIZATION OF APPROPRIATIONS

16 U.S.C.A. § 1444

SEC. 10. (a) AUTHORIZATION FOR SECRETARY OF COMMERCE. – Section 313(2)(C) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1444(2)(C) is amended by striking "$3,000,000" and inserting in lieu thereof "$4,000,000".

Sec. 10(b)

(b) AUTHORIZATION FOR EPA ADMINISTRATOR. – There are authorized to be appropriated to the Administrator of the Environmental Protection Agency $750,000 for each of the fiscal years 1991 and 1992.

Sec. 10(c)

(c) REPORT. – The Secretary of Commerce shall, not later than March 1, 1991, submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the future requirements for funding the Sanctuary through fiscal year 1999 under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 14321 et seq.).